TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 37

THE UNITED STATES OF AMERICA, AS GUARDIAN OF THE INDIANS OF THE TRIBE OF HUALPAI IN THE STATE OF ARIZONA, PETITIONER

vs.

SANTA FE PACIFIC RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 23, 1941
CERTIORARI GRANTED MARCH 10, 1941

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 717

THE UNITED STATES OF AMERICA, AS GUARDIAN OF THE INDIANS OF THE TRIBE OF HUALPAI IN THE STATE OF ARIZONA, PETITIONER

vs.

SANTA FE PACIFIC RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States
for the District of Arizona
Suit to quiet title and for an accounting

No. E-190—Prct.

In Equity

THE UNITED STATES OF AMERICA, as Guardian of the Indians of the Tribe of Hualpai in the State of Arizona,

Plaintiff,

vs.

SANTA FE PACIFIC RAILROAD COMPANY, a corporation,

Defendant.

COMPLAINT.

Comes now the United States of America, as Guardian of the Indians of the tribe of Hualpai, variously spelled Hualapai, or Walapai, etc., a tribe of Indians who have lived within the exterior limits of the present State of Arizona from time immemorial and are now residing upon an Indian reservation in said State known as the Hualpai Indian Reservation, now embraced within the judicial district of the State of Arizona, and brings this, its bill of complaint against Santa Fe Pacific Railroad Company, a corporation; and plaintiff avers, for a first cause of action:

1. That this action is brought by Frank E. Flynn, United States Attorney for the District of

Arizona, by the direction and under the authority of the Attorney General of the United States. That this action is brought by the United States of America and arises under the laws of the United States and is a cause in which the District Courts have original jurisdiction.

2. The defendant, Santa Fe Pacific Railroad Company, is a corporation duly incorporated under and by virtue of an Act of [4] Congress approved March 3, 1897, but doing business, and authorized to do business in the State and District of Arizona, and elsewhere.

3. The plaintiff, United States of America, is now and for a long time past has been the owner in fee simple of all that certain tract, piece and parcel of land within the exterior limits of the Hualpai (or Huaiapai) Indian Reservation, within the State and District of Arizona, which was set aside and reserved by executive order of President Chester A. Arthur on January 4, 1883, for the use and occupancy of the said Hualpai tribe of Indians.

4. The tribe of Hualpai Indians, in the said State of Arizona, and the Indians comprising said tribe, at all times mentioned herein, have been and now are tribal Indians, and have been and now are wards of this plaintiff, non sui juris, and incompetent to manage their own affairs; that this suit is brought by plaintiff in its own right, and on behalf of said tribe and the Indians thereof, in

its capacity as guardian and trustee of said Indians and their property.

5. At all times material to this complaint, and long prior thereto, the Hualpai tribe were and now are in possession of and occupying the lands within the exterior boundaries of the Hualpai Reservation, as hereinafter described.

6. The creation of a military reservation of the lands hereinafter described was recommended by duly constituted authorities of the United States Army then in charge of said Hualpai tribe, on July 8, 1881, subject to the approval of the President, and the lands hereinafter described were at that time set apart as a Military Reservation for the subsistance and better control of the Hualpai Indians.

7. On August 4, 1882, the then Secretary of War confirmed the order creating the Hualpai Reservation as a [5] Military Reservation, and on September 5, 1882, the then Commissioner of Indian Affairs recommended to the Secretary of the Interior the establishment of the reservation, herein described and referred to, as an Indian reservation. On January 2, 1883, the then Secretary of the Interior submitted to the President of the United States, with his favorable recommendation, a draft of an executive order for the withdrawal of said lands in the Territory of Arizona as an Indian Reservation.

8. Pursuant to recommendation in the last paragraph referred to, on January 4, 1883, the President set aside and reserved for the use and occupancy of the Hualpai Indians the said lands, describing same as follows:

> Beginning at a point on the Colorado River five (5) miles eastward of Tinnakah Spring; thence south twenty (20) miles to crest of high mesa; thence south 40° east twenty-five (25) miles to a point of Music Mountains; then east fifteen (15) miles; thence north 50 degrees east thirty-five (35) miles; thence north thirty (30) miles to the Colorado River; thence along said river to the place of beginning; the southern boundary being at least two (2) miles south of Peach Spring, and the eastern boundary at least two (2) miles east of Pine Spring. All bearings and distances being approximate,

which lands as thereafter surveyed are more particularly described as follows:

> Beginning at a point on the left bank of the Colorado River located in Sec. 21, T. 31 N., R. 15 W., G. & S.R.M.
>
> Thence South 20 miles to an Iron Post marked and described by General Land Office Survey as 20 mile corner, located in Sec. 32, T. 28 N., R. 15 W., G. & S. R. M.
>
> Thence South 39 deg. 58 min. East, 1 mile;
>
> Thence South 40 deg. 08 min. East ½ mile;

Thence South 39 deg. 49 min. East, ½ mile;
Thence South 40 deg. 02 min. East, ½ mile;
Thence South 40 deg. 16 min. East, ½ mile;
Thence South 39 deg. 54 min. East, ½ mile;
Thence South 40 deg. 00 min. East, 2½ miles;
Thence South 40 deg. 11 min. East, ½ mile;
Thence South 40 deg. 00 min. East, 2 miles;
Thence South 40 deg. 07 min. East, ½ mile;
Thence South 40 deg. 14 min. East, ½ mile.
Thence South 40 deg. 00 min. East, 3 miles;

[6]

Thence South 39 deg. 41 min. East, ½ mile;
Thence South 40 deg. 00 min. East, ½ mile;
Thence South 40 deg. 17 min. East, ½ mile;
Thence South 39 deg. 39 min. East, ½ mile;
Thence South 40 deg. 00 min. East, 4 miles;
Thence South 39 deg. 57 min. East, ½ mile;
Thence South 40 deg. 02 min. East, ½ mile;
Thence South 40 deg. 00 min. East, 6 miles;
to the 45 mile or Southwest corner, located in Sec. 1, T. 24 N., R. 13 W., G. & S.R.M.

Thence East 15 miles to the 60 mile or Southeast Corner, located in Sec. 5, T. 24 N., R. 10 E., G. & S.R.M.

Thence North 50 deg. 00 min. East, 1½ miles;
Thence North 50 deg. 10 min. East, 1 mile;
Thence North 50 deg. 00 min. East, 1 mile;
Thence North 50 deg. 10 min. East, ½ mile;
Thence North 50 deg. 00 min. East, 7½ miles;
Thence North 49 deg. 57 min. East, ½ mile;

Thence North 50 deg. 00 min. East, 7 miles;

Thence North 50 deg. 05 min. East, ½ mile;

Thence North 50 deg. 10 min. East, 1½ miles;

Thence North 50 deg. 00 min. East, 14 miles;

to the 95 mile corner located in Sec. 12, T. 28 N., R. 6 W., G. & S.R.M.

Thence North 31 miles, more or less, to the Northeast corner located on the South or left bank of the Colorado River;

Thence down that stream to the place of beginning.

9. The defendant, Santa Fe Pacific Railroad Company, claims alternate odd numbered sections, as surveyed, within the exterior boundaries of the lands described in this cause of action, as successor to the Atlantic and Pacific Railroad Company, the grantee in the Act of Congress of July 27, 1866 (14 Stat. L. 272). To that extent its claim is adverse to the title of plaintiff, the United States of America, and to the right of occupancy of said Hualpai tribe of Indians. Said adverse claim of the defendant is without any foundation or right whatever in law or equity.

It is further alleged that the lands subject to the claim of defendant were not, at the date of the passage of said Act of Congress, of July 27, 1866, (14 Stat. L. 272), public lands of the United States within the meaning of said Act, but were reserved, or otherwise appropriated, under the public policy

of the United States and under the terms of the said Act of July [7] 27, 1866, for the exclusive use and occupancy of said tribe of Hualpai Indians until voluntarily ceded by said tribe of Indians, the same having been at all times material herein and from time immemorial the ancestral home of said tribe, and so occupied by them; and,—that said tribe of Hualpai Indians never ceded the said lands, or any part thereof.

10. The defendant has from time to time unlawfully entered upon portions of said Hualpai Reservation and committed acts of trespass thereon by using the same, or leasing the same to others for use, and by surveying or attempting to survey portions of said reservation, and by designating thereon boundaries of tracts, by running furrows, driving stakes, digging ditches, laying pipe lines, and by constructing telephone lines, dams and reservoirs, buildings and fences, thereon and thereover; and said defendant threatens to continue its said acts of trespass, and thereby has interfered, and threatens to continue to interfere with the possession, occupancy and use of said Hualpai Reservation, or parts thereof, by said Hualpai tribe, and the Indian members thereof.

11. Plaintiff further alleges that the claim of said defendant, under the said Act of Congress, of July 27, 1866, and the acts of trespass in the last paragraph referred to, cast a cloud upon the title of plaintiff to the lands, herein described and re-

ferred to, and, upon the right of occupancy, use and possession of, said lands by the said tribe of Indians and members thereof; and, that said defendant threatens to exclude said tribe of Indians, and its members, from the peaceful occupation, use, possession and enjoyment of said lands, or parts thereof, within the said reservation herein described. [8]

12. By the terms of the Act of Congress of July 27, 1866, the Atlantic and Pacific Railroad Company was required to complete construction of the railroad by July 4, 1878, and had not constructed its railroad through the said Hualpai Indian Reservation as plaintiff is informed and believes and therefore alleges upon information and belief, and had not constructed said railroad through said reservation upon the date of the military order of July 8, 1881, or of the executive order of January 4, 1883, above referred to.

13. The United States of America and the said tribe of Hualpai Indians, at all times material to this cause of action, have been, and now are, in the open, notorious, actual, peaceable, and exclusive possession of said real property, and every part thereof, adverse to the whole world, with color of title, and have continued in such occupation and possession for more than twenty (20) years last past.

14. Damages at law cannot be estimated and are incapable of exact determination and are inadequate

to remedy or compensate for the injuries herein set forth; and the right, claim and title of said Hualpai tribe to the lands above referred to cannot be enforced at law without a multiplicity of suits, all involving the same questions and the consideration of the same statutes, either of the United States or of the State or former Territory of Arizona; and the right of said Hualpai tribe and the Indians thereof to protection against the trespasses of the defendant continuing, and threatening to continue, as aforesaid, and the removal of the cloud existing by reason of the Act of Congress of July 27, 1866, (14 Stat. L. 272), create irreparable injury and damage and can only be adequately remedied in equity. [9]

Second Cause of Action

1. For a second and further cause of action Plaintiff reiterates and restates all that is alleged in Paragraphs 1, 2, 4, and 14 of the first cause of action of this bill of complaint to which reference is hereby made as fully as though set forth at length herein.

2. The plaintiff, United States of America, as guardian of the Hualpai tribe of Indians, at all times material to this cause of action has been and, except as herein specified and set forth, is the owner in fee simple of all those certain tracts, pieces and parcels of land lying south and west of the Hualpai Indian Reservation, described as follows:

Beginning at a point on the left bank of the Colorado River located in Sec. 21, T. 31 N., R. 15 W., G. & S.R.M., which is the Northwest corner of the Hualpai Indian Reservation; thence South twenty miles to an iron post marked and described by General Land Office Survey as Twenty-mile Corner, located in Sec. 32, T. 28 N., R. 15 W., G. & S.R.M., being the West boundary of the Hualpai Indian Reservation as officially surveyed; thence in a Southeasterly direction to the Forty-five Mile or Southwest Corner of the Hualpai Indian Reservation as officially surveyed, located in Sec. 1, T. 24 N., R. 13 W., G. & S.R.M.; thence East fifteen miles to the Sixty-mile or Southeast Corner, of said Hualpai Indian Reservation, located in Sec. 5, T. 24 N., R. 10 W., G. & S.R.M.; thence North approximately fifty degrees East, thirty-five miles to the Ninety-five-mile corner of the Hualpai Indian Reservation as officially surveyed, located in Sec. 12, T. 28 N., R. 6 W., G. & S.R.M.; thence North thirty-one miles, more or less, to the Northeast corner of the Hualpai Indian Reservation, or the point of intersection of the Eastern line of said Reservation with the Colorado River; thence along said Colorado [10] River Eastward to the mouth of Cataract Creek; thence following the meandering of said Cataract Creek to its source on Bill Williams Mountain in approximately Section 17, Township 21 North, Range 2 East, G. & S.R.B. & M., more particularly described as being Latitude 35° 12', Longi-

tude 112° 12′ 16″. Thence in a southwesterly direction approximately 63 miles to the source of the Santa Maria River, being the juncture of Sycamore and Kirkland Creeks, and located 4 miles southeast of Ship Mountain in approximately Section 21, Township 14 North, Range 7 West, G. & S.R.B. & M.; thence following the meandering of the Santa Maria River to the juncture with the Bill Williams Fork, now called the Williams River, in approximately Section 8, Township 11 North, Range 12 West, G. & S.R.B. & M.; thence following the meandering of the Big Williams Fork, or Williams River to its point of junction with the Colorado River; thence following the meandering of the Colorado River as the Western and Northern boundaries of the tract therein described to the place or point of beginning, except that a portion of the reservation set aside for the use and occupancy of the Mojave Indians is excepted therefrom, the said area excluded being more particularly described by metes and bounds as follows:

Begninning at the Northeast corner of the Fort Mojave Indian Reservation,

Thence

South 0° 35′ 14″ West 24.02 Chains to mile corner No. 1

South 0° 17′ 03″ West 40.06 Chains to mile corner No. 1½

South 0° 26′ 04″ West 40.00 Chains to mile corner No. 2

South 0° 32′ 56″ West 40.12 Chains to mile corner No. 2½

South 0° 29′ 03″ West 40.07 Chains to mile corner No. 3

South 0° 31′ 13″ West 40.10 Chains to mile corner No. 3½

South 0° 29′ 03″ West 39.98 Chains to mile corner No. 4

South 0° 29′ 03″ West 40.10 Chains to mile corner No. 4½

South 0° 35′ 06″ West 40.22 Chains to mile corner No. 5

South 0° 38′ 06″ West 7.31 Chains to East side center monument

South 1° 03′ 19″ West 32.87 Chains to mile corner No. 5½

South 1° 03′ 19″ West 40.22 Chains to mile corner No. 6

South 1° 03′ 25″ West 40.10 Chains to mile corner No. 6½

South 1° 03′ 25″ West 40.10 Chains to mile corner No. 7

South 1° 03′ 25″ West 40.10 Chains to mile corner No. 7½

South 1° 03′ 25″ West 40.10 Chains to mile corner No. 8

South 1° 04′ 28″ West 37.74 Chains to Southeast corner of Reservation [11]

South 76° 17′ 28″ West 42.26 Chains to mile corner No. 9

South 76° 17′ 28″ West 80.00 Chains to mile corner No. 10

South 76° 17′ 28″ West 4.00 Chains to left or East Bank of the Colorado River.

Thence

Northerly along the left bank of the river approximately 9 miles to the North boundary of the reservation,

Thence

South 56° 51′ 52″ East 56 Chains to point of beginning.

The Reservation is located in Townships 18 and 19 North, Range 22 West, Gila and Salt River Meridian, and this description is based upon a survey made by the General Land Office as shown by plat accepted January 23, 1931. The boundaries, with the exception of the river boundary, are monumented on the ground.

3. Plaintiff further alleges that at the time of the passage by the Congress of the United States of the Act of July 27, 1866 (14 Stat. L. 272) purporting to grant to the Atalantic and Pacific Railroad Company, the predecessor in interest of the defendant herein, every alternate section of public land, not mineral, to the amount of twenty sections per mile on each side of the railroad to be constructed, and at the time of filing of the map of definite location of said railroad on March 12, 1872, by said Atlantic and Pacific Railroad Company, the

said Hualpai Indian tribe were occupying all of the lands, in the last paragraph described, and have continued so to occupy and possess all of said lands up to the filing of this complaint.

4. Plaintiff further alleges that at the time of the passage of the granting Act of July 27, 1866 (14 Stat. L. 272) and at the time of the filing of the map of definite location of said railroad, March 12, 1872, the lands in this cause of action, described and referred to, were not public lands within the terms of said Act of Congress, but were lands owned in fee by the United States of America and reserved or otherwise appropriated and subject to the claims and right of occupancy of said tribe of Hualpai Indians.

5. Santa Fe Pacific Railroad Company claims alternate odd numbered sections, not lieu lands, as surveyed, within the [12] limits of the exterior boundaries of the lands described in Paragraph 2 of this cause of action, as successor to the Atlantic and Pacific Railroad Company, the grantee in that certain Act of Congress of July 27, 1866 (14 Stat. L. 272), and to that extent its claim is adverse to the plaintiff, the United States of America, as guardian and trustee of said Hualpai tribe of Indians, and to the right of occupancy of said Hualpai tribe of Indians, existing at the time of the passage of said Act of Congress, and continuing to the date of the filing of this complaint. Said adverse claim of

the defendant is without any right whatever and the lands subject to said claim were not, at the date of the passage of said Act of Congress, or at this time, public lands of the United States within the meaning of said Act, but were lands reserved or otherwise appropriated under the public policy of the United States and under the terms of the said Act of July 27, 1866 (14 Stat. L. 272) for the use and occupancy of said tribe of Hualpai Indians, and subject to the claim or right of occupancy until voluntarily ceded by said tribe of Indians, the same having been at all times material herein the ancestral home of said Hualpai tribe of Indians.

The claims of said defendant in the last paragraph referred to are subordinate to the title and right of occupancy of said Hualpai Indian tribe, and the assertion thereof by said defendant with the resultant trespasses casts a cloud upon the title, possession and right of ocupancy of said Hualpai tribe, and the members thereof, and the defendant threatens to exclude said tribe of Indians, and the individual members thereof, from the peaceful enjoyment and use of the lands referred to, in this cause of action, under their right of occupancy thereof.

7. Under the terms of said Act of Congress of July 27, 1866, (14 Stat. L. 272) the grant to the Atlantic and Pacific Railroad Company only attached to public lands to which the [13] United

States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said railroad was designated by a plat thereof, filed in the office of the Commissioner of the General Land Office, and whenever, prior to said time, any of said alternate sections had been granted, sold, released, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands were required to be selected by the grantee, under said Act of Congress, in lieu thereof as directed in said Act. It was further specifically provided that the Indian title to all lands falling under the operation of the Act, referred to, and acquired in the donation to the grantee named in the Act should be extinguished as rapidly as should be consistent with public policy and the welfare of the Indians, but only by their voluntary cession. It is alleged by plaintiff that the grant to the Atlantic and Pacific Railroad Company under said Act of Congress of July 27, 1866 (14 Stat. L. 272), did not attach to the alternate, odd numbered sections, as surveyed, within the limits of the land described in Paragraph 2 of this cause of action; that the title of the Hualpai tribe of Indians under its right of occupancy, herein alleged, constituted under the public policy of the United States and under the express terms of the said Act of Congress a reservation or appropriation of said lands for the use and occupancy of said tribe of Indians, and is a claim or right to said

lands in said tribe of Indians, under the terms of said Act of Congress.

8. Plaintiff further alleges that between the years 1852 and 1872 the plaintiff sent a number of agents to the Territory of Arizona charged with the duty, among other things, of ascertaining the whereabouts and extent of the ancestral home of the Hualpai Indian tribe, whose reports defined the character and extent of the occupancy of said tribe, which was recognized [14] thereafter by the President of the United States and other executive officers of the Government and attained the status and dignity of an Indian Reservation without formal designation as such.

9. That patents to alternate, odd numbered sections of said lands in Paragraph 5 referred to were from time to time issued by the United States to the Santa Fe Pacific Railroad Company, successor to the said Atlantic and Pacific Railroad Company, in substantially the form, exclusive of dates and descriptions of land, of the copy thereof hereto attached and made a part hereof as Exhibit "A".

That said patents were issued under a mistake of law and of fact that the said lands were not subject to title, claim or right of said Hualpai tribe of Indians arising by reason of prior occupancy, use and possession of said lands by the said tribe of Hualpai Indians, as alleged in this cause of action.

Plaintiff further alleges that the occupancy of

said lands by said tribe of Hualpai Indians is a claim or right, which under said Act of Congress (14 Stat. L. 272) has not been extinguished by the voluntary cession thereof by said tribe, and, that the patents issued to the defendant herein, as alleged in this paragraph, are void because issued in contravention of the express terms of said Act of Congress (14 Stat. L. 272) and should be cancelled unless the lands therein described have been subsequently assigned to innocent holders and assignees, and, that defendant should be required to make a full and complete disclosure of all conveyances, assignments, or transfers of said lands or any part thereof.

10. The plaintiff is informed and believes and therefore alleges upon information and belief that the defendant has sold, rented, leased, or contracted so to do, large numbers of tracts or parcels of land so patented to it, and derived large amounts of income from such sales and rentals from divers and [15] sundry persons, unknown to plaintiff, all of which constitutes a fraud up on the plaintiff and a violation of the right of occupancy of said tribe of Hualpai Indians, for which defendant should be required to make an accounting.

Wherefore, plaintiff prays that said defendants be required to disclose the facts and nature of any claim whatsoever made or asserted by it adverse to the plaintiff, the United States of America as guar-

dian of said tribe, and to the claim, right of occupancy and title of said Hualpai tribe as aforesaid, and that thereupon it may be adjudged and decreed that any and all right, title or interest claimed or asserted by said defendant in, to or upon the lands and premises hereinabove averred, owned by plaintiff and occupied by said Hualpai Indians, may be adjudged and decreed to be null and void, or, if found valid, be adjudged and decreed to be subject to the continued right of occupancy and use by said Hualpai tribe, and that if it be adjudged and decreed that said defendant has not any estate, right, title or interest whatever in or to said land and premises, that the title to said premises and all thereof may be quieted in the plaintiff, subject to said right of occupancy and use of said tribe of Hualpai Indians; that the said defendant be required to disclose the extent of its claims, and assignments or conveyances thereof, and to account for all rents, issues and profits derived from the leasing, renting or use of the lands subject to said right of occupancy by said Hualpai tribe, and that upon final decree herein the defendant, its agents or other representatives be perpetually enjoined from further asserting any right, title or interest in or to said lands above described and from trespassing thereon or interfering with the full possession and occupancy thereof [16] by the said Hualpai tribe of Indians, and that plaintiff may

have such other and further relief as to the court may *see* proper.

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[17]

EXHIBIT "A"

PATENT

Dated .....

United States of America to
Santa Fe Pacific Railroad Company.

To all to whom these presents shall come, greeting:
Whereas, By the Act of Congress approved July

27, 1866, entitled "An Act granting lands to aid in the Construction of a Railroad and Telegraph line, from the States of Missouri and Arkansas to the Pacific Coast," there was granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said Railroad and Telegraph line to the Pacific Coast, "Every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said Company may adopt through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad wherever it passes through any state and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the general land office"; and

Whereas, official statements bearing dates December 16, 1882, April 19, 1881, January 7 and December 17, 1880, and November 3, 1883 have been filed in the general Land Office, showing that the commissioners appointed by the President, under the provisions of the fourth section of the said act of Congress, approved July 27, 1866, have reported to him that the line of said Railroad and telegraph, from a point in Township eight north of Range two

east, Territory of New Mexico, and ending at a point on the west bank of the Colorado River in the State of California, has been constructed and fully completed and equipped in the manner prescribed by the said Act of Congress; and

Whereas, Certain tracts of land have been listed by the duly authorized land agent of the said Atlantic and Pacific Railroad Company, or its successor in interest as shown by his original list approved by the local officers, and now on file in the General Land Office; and

Whereas, It is shown by evidence filed in the office of the Secretary of the Interior, that the Santa Fe Pacific Railroad Company under a purchase at foreclosure sale of the property and rights of the Atlantic and Pacific Railroad Company, and by compliance with the provisions of the Act of Congress approved March 3, 1887, (29 Stat. 622), became the lawful successor in interest of the said Atlantic and Pacific Railroad Company; and [18]

Whereas, The said tracts of land lie coterminous to the constructed line of road, and are particularly described as follows, to-wit:

(Description of lands)

Now Know Ye, That The United States of America, in the consideration of the premises, and pursuant to said Acts of Congress, has given and granted, and by these presents does give and grant, unto the said Santa Fe Pacific Railroad Company,

successor in interest to the Atlantic and Pacific Railroad Company, and to its successors and assigns, the tracts of land listed as aforesaid and described in the foregoing. To have and to hold the said tracts with the appurtenances thereof, unto the said Santa Fe Pacific Railroad Company, successor as aforesaid, and to its successors and assigns forever.

In Testimony Whereof, I, William H. Taft, President of the United States of America, have caused these letters to be made Patent, and the Seal of the General Land Office to be herewith affixed.

Given under my hand at the City of Washington the ..... day of ....., in the year of our Lord ....., and of the Independence of the United States the .....

[Seal] By the President: .....

By....., Secretary.

.....

Acting Recorder of the General Land Office.

Patent Number: .....

Recorded: Vol. ..... Page .....

[Endorsed]: Filed June 28, 1937. [19]

[Title of District Court and Cause.]

MOTION TO DISMISS PLAINTIFF'S COMPLAINT.

Comes now the defendant, Santa Fe Pacific Railroad Company, a corporation, and respectfully

moves this Honorable Court to dismiss plaintiff's complaint on file herein, and each of the two alleged causes of action therein contained, upon the following grounds and for the following reasons, to-wit:

I.

That the facts alleged in said complaint and in each of the two alleged causes of action therein contained are insufficient to constitute a valid cause of action in equity against the defendant;

II.

As a matter of public record and common knowledge plaintiff, in its own right or as guardian for Walapai[1] Indians, is not, and defendant is, the legal and equitable owner of the unburdened and unqualified fee simple title to all lands in controversy.

[24]

III.

The action is barred by controlling political policies and acts of Congress and the executive which are public records and common knowledge.

IV.

As a matter of public record and common knowledge, the plea of limitation title contained in paragraph 13 of the first cause of action is not supported.

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[1]This spelling will be adopted throughout defendant's pleadings.

Wherefore, defendant prays the judgment of this Court whether it shall further answer, and that it be dismissed with its costs.

CHARLES H. WOODS,
JOYCE COX,
FENNEMORE, CRAIG, ALLEN & BLEDSOE,
By ROSS F. JONES. [25]

[Title of District Court and Cause.]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT.

Explanatory Preface

Plaintiff asserts two causes of action. Since the grounds of this motion to dismiss, and substantiating authorities, are predominantly the same with respect to both causes of action, the points and subpoints are handled, with minor exceptions, together, without distinction between the two causes of action.

The pleading recites, in general introduction and concluding prayer, that the United States seeks to recover as guardian for the Walapai Indians. Paragraph 2 of the second cause of action alleges the United States, as guardian of said Indians, is the fee simple owner; but paragraph 3 of the first

cause asserts simply that the United States is the owner in fee. We are unable to determine whether distinction is intended, but in our points will take the position that defendant's title is good as against all claims of the United States, either in its own right or as Indian guardian. [26]

In both causes of action the lands are alleged to have been reserved, under the policy of the United States, and excepted from the grant of July 27, 1866. Paragraphs 6, 7, and 12 of the first cause of action allege military and executive orders, 1881 to 1883, creating the Walapai Indian reservation at a time when the Atlantic and Pacific Railroad Company had not completely constructed its line. Paragraph 8 of the second cause of action alleges that some agents between 1852 and 1872, names not given, made reports and performed acts, none of which are described, which had the legal result of making the lands an Indian reservation.

The first cause of action (paragraphs 5 and 9), and the second cause of action (paragraphs 3, 4, 5, and 7), assert that the lands in issue were occupied by the Walapai Indians as their ancestral home. No indication is made that one or the other locality was such ancestral home; and we will assume that it is intended to allege that all territory title to which is in issue in both causes of action was the ancestral home of the Walapai.

Defendant is uncertain as to whether plaintiff's theory is that the lands were excepted from its

grant because of some specific act of reservation or disposal to the Indians (as the recommendation of the military in 1881-1882 and order of President Arthur in 1883, first cause, and of the acts of agents obscurely referred to in paragraph 8, second cause); or whether some act or acts of Congress are relied upon as establishing "public policy." In this motion defendant will show that neither theory, nor any other, can possibly prevail, because the Indians have no rights in conflict with defendant's rights, which attached July 27, 1866, by relation from March 12, 1872, and have been confirmed and reconfirmed by Congress and the executive.

The first cause of action (paragraph 12) alleges twenty years of adverse possession as a basis for plaintiff's claim. No parallel pleading is found in the second cause of action. [27]

Unique to the second cause of action is a plea for an accounting (paragraphs 9 and 10).

Prayer of the complaint is for adjudication that defendant's claims are void and, alternatively, that if they are valid they are subordinate to Indian occupancy right. An accounting, an injunction, and general relief are asked.

The basic theory of this motion is that, to the knowledge of the Court, the complaint states no cause of action. Arizona v. California, 283 U. S. 423, 452; Nev Cal Electric Securities Co. v. Imperial Irrigation District, 85 Fed (2d) 886, 904-5, 906 (certiorari denied, 300 U. S. 662).

There are several matters which will not be disputed, to-wit: the incorporation of defendant alleged in paragraph 2 of the first cause of action, paragraph 1 of the second cause of action; that defendant claims as successor to the Atlantic and Pacific Railroad Company, paragraph 9, first cause, paragraph 5, second cause; that plaintiff's claims are adverse to defendant's claims, paragraphs 9, 11, and 14, first cause, paragraphs 1 and 5, second cause; that the Atlantic and Pacific Railroad Company's map of definite location was filed March 12, 1872, paragraphs 3 and 4, second cause; that patents have issued to lands in the second cause, paragraph 9.

For convenience of the Court, extracts from some of the authorities referred to have been made and attached to the end of the points. (For instance, * appearing after a citation will indicate that extract is attached as Appendix 1, etc.) [28]

Points and Authorities

I.

THE WALAPAI HAVE NEVER BEEN ACCORDED ANY POSSESSORY RIGHT IN THE LANDS INVOLVED UNDER THE POLICY AND LAWS OF THE UNITED STATES (SUPPORTING PARAGRAPHS I AND II OF MOTION).

A. The Walapai have enjoyed and now have

only such legal right as Congress has seen fit to allow them.

Barker v. Harvey, 181 U. S. 481, 482;
United States v. Title Ins. & Trust Co., 265 U. S. 472;
Super v. Work, 3 Fed. (2d) 90; affirmed 271 U. S. 643;
Johnson v. McIntosh, 8 Wheat. 543, 588-9;
Worcester v. Georgia, 6 Pet. 515, 543, 582.

B. The Walapai were disunited bands of non-agricultural, nomadic savages who occupied exclusively no definable territory and no place or places for any great length of time.

1. Garces found them in 1766 subsisting on wild foods and dressing in skins, around modern present reservation (Ibid., 6-11); also from Diamond Creek to the Black Mountains Yabipais Cuercomanches (Coues, On the Trail of a Spanish Pioneer*[1]).

2. The Pedro Font map of 1777 shows Yabipai north of Walapai (17 Works of H. H. Bancroft*[2], photostat attached). Walapai are later in position formerly shown to have been occupied by Yabipai. (18th Annual Report of the Bureau of Ethnology, Arizona maps. Photostat [29] of map and key attached*[3]. Also indicates

Kingman (W.P. 4-6); Yabipai were on the

[1]The letters W. P. are used herein as an abbreviated reference to Walapai Papers, Senate Document 273, 74th Congress, 2nd Session.

no Walapai on lands later becoming reservation.)

3. Seviches were later south of the river from Diamond River to the west end of the present reservation, with gardens at Peach Springs.

   Wheeler, Preliminary Report of Exploration in Nevada and Arizona, 1871, pp. 28, 72, S. Ex. Doc. No. 65, 42d Cong., 2d Sess.;

   Progress Report, Geographical and Geological Explorations and Surveys, West of the 100th Meridian, 1872, p. 37; 1 Coues, supra, 224, f/n*4; Major W. P., 47, 74-5.

4. Yavapai (Yabipai) were at various parts of the country at various times; Sitgreaves in 1851 reported Yabipai in the northern part of the territory, W. P., 7, f/n, 13-15; Whipple reported them about twenty miles south of Truxton in 1854, Senate Executive Document 78, 1855, Whipple Report, 96, 97, 110*5; Captain John Bourke, U. S. A., reported a military expedition against the Yavapai south of the Cerbat Mountains, 1872. The New Mexico Historical Review, 1934, No. 2, April, p. 178; see also Major Price Reports, W. P., 48, 82, 87, 90; Wheeler, Preliminary Report of Exploration in Nevada and Arizona, 1871, 86-89.

5. Apaches were at various parts of the country at various times; Major Price reports Tonto Apaches ranged from [30] northern portion of

Juniper Mountains east to Bill Williams Mountains, W. P., 89, 90.

6. Lieutenant Wheeler in his Preliminary Report, supra, p. 19, S. Ex. Doc. 65, classified Walapai as "that wild, roving breed known as 'Mountain Indians.' Their lawless and migratory life has carried them beyond the notion of anything like order, even among their own people"; Major Price stated Yavapai and Apache bands' habit of living wa similar to that of the Walapai and, "They appear to have no tribal cohesion, each band appearing independently in their hostilities to the settlers," W. P., 90.

7. Scarcity of water, and the hunter life, caused wandering, and conflict over sources of water and food caused constant redistribution of populations. Papers of the Archeological Institute of America, Part I of Final Report of Investigations Among the Indians of the Southwestern United States, carried on mainly in the years from 1880 to 1885, by A. F. Bandelier, pp. 30-33**.

C. Indians such as Walapai may not assert a claim to possessory right.

1. Legal capacity to enjoy corporate rights, never having been created by political recognition, is non- [31] existent. The Cherokee Trust Funds, 117 U. S. 288; The Kansas Indians, 5 Wall. 737, 756-7. Neither by treaty nor otherwise has

any corporate Walapai capacity been recognized.

2. There was no such occupation as would justify recognition of a claim of possessory right. Assiniboine Indian Tribe v. United States, 77 Ct. Cl. 347.

D. No right was recognized in the Walapai.

1. Mexico ceded the land to the United States in 1848 by the treaty of Guadalupe Hidalgo (9 Stat. 922). The Walapai were of the "savage tribes" which under the treaty (Art. XI) the United States undertook to restrain and had the right to remove.

2. The 18th Annual Report of the Bureau of American Ethnology shows the United States assumed title to all lands from the Rio Grande to the Colorado included in defendant's grant.*[3]

3. Senate Document No. 18, 2nd Session, 31st Congress, Vol. 3, 1850-51, p. 34, Report of William Carey Jones on land titles in California: "In the wild or wandering tribes the Spanish law does not recognize any title whatever to the soil."

4. From Report of Lieutenant Sylvester Mowry on Indian tribes of Arizona, Report of Commissioner of Indian [32] Affairs, 1857, H. Ex. Doc. 2, 35th Cong., 1st Sess., pp. 584-93: "The

country occupied by the wild tribes was expressly declared to be public domain." (Under Spanish-Mexican law.)

5. IV Kappler, Indian Affairs, Laws and Treaties, Senate Document 53, 70th Congress (1929), pp. 1170-71:

"In regard to land acquired by the United States from Spain and Mexico, the Indian right of occupancy is not recognized, except where recognized by Spanish and Mexican Governments prior to cession to the United States, or where the United States gave rights to the Indians within these ceded territories by treaty, act of Congress, or executive order, after cession, or by treaty or act of Congress recognized that Indians within these ceded territories possessed such rights of occupancy or possession."

6. Report of the Commissioner of the General Land Office for 1860, S. Ex. Doc. No. 1, 36th Cong., 2d Sess., p. 51:

"In California the Indians have not been recognized as holding any specific tracts of country; but have been collected and transferred to reservations set apart for their protection . . ."

7. Report of the Secretary of the Interior for 1860, S. Ex. Doc. No. 1, 36th Cong., 2d Sess., pp. 34-36:

"With the wild tribes in the heart of the Continent, in Arizona, and in California . . .

we have no treaties whosoever . . ." " . . . the government is free to pursue such a policy as circumstances may render expedient."

8. Report of the Commissioner of Indian Affairs, 1869, House Executive Document No. 1, Part 3, 41st Congress, 2nd Session:

"They (Indians in California) are not in treaty relations with the United States. Negotiations were entered into with many of the tribes in 1851, by commissioners [33] authorized for the purpose, but the treaties then effected were never confirmed, the Senate rejecting them on the ground that the United States, acquiring possession of the territory from Mexico, succeeded to its rights in the soil, and, as that government regarded itself as the absolute and unqualified owner of it, and held that the Indians had no usufructuary or other rights therein which were to be in any manner respected, they, the United States, were under no obligations to treat with the Indians occupying the same for the extinguishment of their title." (p. 457-8.)

Speaking of Arizona: "A large, wild, and apparently untamable body of Indians are embraced in this superintendency . . . As with the Indians in California, so with these, they are not in treaty relations with the United States." (p. 460.)

"The Indian title to lands in the Territory (Arizona) ignored, and difficulties ever increasing between them and a rapidly growing population . . . some provisions should be made . . ." (p. 461.)

9. Report of the Commissioner of Indian Affairs, 1890, H. Ex. Doc. No. 1, Pt. 5, 51st Cong., 2nd Sess., Vol. 2, p. XXX.

". . . the Mexican Government . . . at no time recognized an Indian title within its jurisdiction, except where it had been specially granted. While this Government has recognized that fact, it has never hesitated to provide reservations for the Indians within said States and Territories, as in the case of other Indians, by executive order, or act of Congress, and even by treaty . . .

"The Indian title has been extinguished to all the public domain, except Alaska, and the portion included in one hundred and sixty-two Indian reservations . . ."

10. Testimony of John Collier, Commissioner of Indian Affairs, and Report of the Interior Department, [34] Hearings before the Committee on Indian Affairs, United States Senate, 75th Congress, 1st Session, on S. 1651 and S. 1779*7. No possessory right in Indians was recognized by Spain or Mexico, and it is still the policy of the United States not to create possessory

rights by recognition thereof except by making reservations.

11. Individual Indian rights to well defined areas cultivated by them have been recognized by the United States. Cramer v. United States, 261 U. S. 219; see also 3 L. D. 371; 6 L. D. 341; 32 L. D. 382.

12. Wandering tribes were never recognized as having rights.

Hayt v. United States and Utah Indians, 38 Ct. Cl. 455;

Byrne v. Alas, 74 Cal. 628; 16 Pac. 523;

United States v. Lucero, 1 N. Mex. 422.

E. The covenant in Section 2 of the act of July 27, 1866, by which the United States agreed to "extinguish as rapidly as may be . . ., AND ONLY BY THEIR VOLUNTARY CESSION, the Indian title to all lands . . . acquired in the donation to the road" was not a recognition or creation of any Walapai right.

1. This portion of the act is a contractual covenant, pledge, or stipulation of the United States, running [35] to the grantee.

Buttz v. Northern Pacific Railroad, 119 U. S. 55, 68;

Atlantic and Pacific R. R. Co. v. Mingus, 165 U. S. 413.

2. The clause "and only by their voluntary cession" is a limitation or proviso upon the obligation of the United States.

59 C. J. 1087;

United States v. Morrow, 266 U. S. 531, 534-5;

United States v. Mullendore, 35 Fed. (2d) 78, 82.

3. This part of the act could not give the Walapai any right against the United States.

Gritts v. Fisher, 224 U. S. 640, 648;

Tiger v. Western Investment Co., 221 U. S. 286;

Brader v. James, 246 U. S. 88;

Heckman v. United States, 224 U. S. 413;

Conley v. Ballinger, 216 U. S. 84.

4. The proviso "and only by their voluntary cession" was not a definition of where Indian title existed, or a declaration that it did exist all along the grant. There was no Indian title in Missouri. Report of the Commissioner of the General Land Office for 1860, S. Ex. Doc. 1, 36th Cong., 2d Sess., 51; Indian rights in California were solely in reservations or in Spanish grants presented for confirmation within two years after 1851 (9 Stat. 631), Barker v. Harvey, 181 U. S. 481. The Indians of Arizona without Spanish grants were without right.

Hence, the only Indian right [36] along the line consisted of (a) treaty rights in Indian territory, (b) confirmed Spanish or Mexican grants, and (c) reservations.

5. The clause "and only by their voluntary cession" was an amendment inserted at the behest of the civilized tribes of Indian territory; and the discussion by its sponsor shows that the only Indian rights considered and sought to be protected were in Indian territory, and the words were verbatim from the treaties with said tribes. Congressional Globe, March 1, 1866, 1100 et seq.; March 2, 1866, 1132 et seq.**

F. The affirmative policy of the United States was not to recognize any possessory right in the Walapai, as evidenced (a) by the land and related laws, (b) by its dealing with these Indians, and (c) by its dealing with the railroad land grant.

1. Extension of land and related laws.

(a) New Mexico was created as a territory in 1850 (9 Stat. 446) with police and taxing power and grant of school lands in every township.

(b) The land laws were extended, donations to settlers provided for, and only Spanish and Mexican [37] grants were excepted from the land laws. Act of July 22, 1854 (10 Stat. 308).

(c) On February 24, 1863, Arizona was created from part of New Mexico Territory, and

New Mexico land laws made to apply (12 Stat. 664).

Tumacacori and Calabazas Grant, 16 L. D. 408.

(d) Prescott Land Office was established November 3, 1868, Donaldson, The Public Domain, 173; the Gila office, February 18, 1873 (17 Stat. 465-6); and appropriations were made for surveys from 1865, e. g., 14 Stat. 465, 15 Stat. 116, 15 Stat. 308.

(e) The Surveyor General in 1870 was directed to investigate and report on land titles held under laws and usages of Spain and Mexico (16 Stat. 304).

(f) Proceeds from land sales were appropriated to irrigation projects in 1902 (32 Stat. 388); and in 1912 the number of acres that might be entered was increased to 320 (37 Stat. 132).

(g) The territory exercised the taxing power, Title LVI, 1887 revision, Arizona Statutes; Title LXII, 1901 revision. Counties were [38] authorized to issue bonds, e. g., Coconino (28 Stat. 114), Mohave (35 Stat. 605). The territory protected settler possession on both surveyed and unsurveyed lands. Art. 2222, 1887 revision; Art. 3525, 1901 revision.

(h) The laws effecting Arizona statehood made it clear that Indian Country, exempt from complete sovereignty of the State, was con-

fined to lands occupied by Indians or tribes under right derived from the United States or a prior sovereignty. Section 20 of the Enabling Act of June 20, 1910 (36 Stat. 557); Arizona Constitution, Article XX, Sections Third and Fourth:

Porter v. Hall, 271 Pac. 411;

Langford v. Monteith, 102 U. S. 145;

United States v. McBratney, 104 U. S. 621;

Draper v. United States, 164 U. S. 240.

(i) The Enabling Act of 1910 granted to the State two additional school sections in each township, with provision for indemnity selections for lands lost because of reservations or other appropriations or disposals, and granted for specified purposes 1,350,000 acres additionally. [39]

(j) The lands of Mohave County not in defendant's or other private ownership are now being administered as public lands under the Taylor Grazing Act (48 Stat. 1269, 49 Stat. 1976), Title 43, Sections 315 et seq., U. S. C. See The Grazing Bulletin, January, 1937, map fronting page 11, showing Arizona Grazing District No. 2.

(k) The intent of legislation, and the political policy, to treat all Arizona outside Spanish or Mexican grants and reservations as public domain free of Indian right and open to settlement and grant, are clear from the reports of the Secretary of the Interior,

Commissioner of the General Land Office, and Commissioner of Indian Affairs, transmitted to each Congress by the President. Representative examples are:

(1) Report of the Secretary of the Interior, November 30, 1868 (House Executive Document No. 1, 40th Congress, 3rd Session), at page 72:

"Another cause retarding the prosperity of the Territory is found in the fact that it has been the theatre of Indian hostilities . . . When these difficulties shall have been removed we may look with confidence for a settlement and development of the resources of Arizona. [40]

"The initial point of surveys in the country was established in 1866 at the mouth of the Salt river, or Rio Salinas . . . and 144 miles of exterior lines run, but Indian outbreaks suspended the field work.

"Authority is given by act of 2nd March, 1867, for a district office at Prescott. The quantity of public land to be disposed of is 72,906,304 acres."

(2) Report of the Commissioner of the General Land Office, November 1, 1869 (House Exec. Doc. No. 1, Part 3, 41st Cong., 2nd Sess.), at page 177:

"The area of public lands remaining undisposed of in Arizona, June 30, 1869, was 68,855,890 acres. The United States land office for the disposal of public lands in Arizona is situated at Prescott, where applications should be addressed."

All lands in Arizona slightly exceed 72,000,000 acres.

(3) Report of the Commissioner of the General Land Office, October 27, 1870 (House Exec. Doc. No. 1, Part 4, 41st Cong., 3rd Sess.):

"In regard to right of soil it was settled in the case of the United States vs. Rogers, (4 Howard, 567,) that the Indian tribes are not the owners of the territories occupied by them. These are vacant or unoccupied public lands belonging to the United States." (p. 24.)

" . . . the popular insight detects an underlying infraction of the great law of humanity, of common justice, in the Indian monopoly of the continent." (p. 27.)

"The present determined policy of the general and local governments toward depredatory Indians, however, has recently done much [41] to assist the mining interests and aid the reoccupation of long-deserted mines; so

that the prospects of the Territory in this connection are brighter now than ever before since it became a part of our domain, and so soon as the completion of either or all of the projected interoceanic lines of railway *cross* its limits shall furnish the requisite transportation for its full development, its Indian question will probably be no longer troublesome, . . ." (p. 114.)

"The public-land States and Territories west of the Mississippi have been under the operation of the preemption system in some form almost from their first settlement . . . (Other states and territories and) Arizona will add at least 50,000 more (farms since 7th census), making the grand aggregate of separate rural proprietorships almost 1,700,000 in the States and Territories erected out of the public domain." (p. 180.)

". . . we should rather hail the day when the last squalid remnant of savage life shall have given place to industry and commerce." (p. 181.)

(4) Report of the Secretary of the Interior, 1871 (House Exec. Doc. No. 1, Part 5, 42nd Cong., 2nd Sess.), at page 12:

"The increased value of lands in these Territories (including Arizona), consequent upon the extension of railroads, is rapidly attracting settlers, and it is a matter of the greatest importance to their future prosperity that the private lands should be separated from the public domain at the earliest possible period, to accomplish which result existing legislation is inadequate."

(5) House Executive Document No. 1, Part 5, 42nd Congress, 3rd Session, Report of the Secretary of the Interior, October 31, 1872: [42]

"Measured by any true standard, the present Indian policy . . . has proved a success, inasmuch as for three years it has secured the largest and freest extension and development of our railways and frontier settlements . . . We are assuming, and I think with propriety, that our civilization ought to take the place of their barbarous habits. We therefore claim the right to control the soil which they occupy, and we assume that it is our duty to coerce them, if necessary, into the adoption and practice of our habits and customs." (pp. 3-4.)

"The military occupancy of posts adjacent to the Indian country has not been withdrawn and should not be so long as there is the slightest danger of Indian incursions upon the settlements, or attempts to prevent the extension of new settlements in all legitimate directions . . .

"The policy of confining the wild tribes to smaller reservations is regarded as of the utmost importance; and carried forward to its full extent, will result in restricting them to an area of sufficient extent to furnish them farms for cultivation, and no more. The rapid disappearance of game . . . must operate largely in favor of our efforts to confine the Indians . . . and compel them to abondon their nomadic customs, and establish themselves in permanent homes . . . When the game shall have disappeared, we shall be well forward in the work in hand." (pp. 5-6.)

(6) Report of the Commissioner of the General Land Office, October 26, 1872, Ibid.

"Toward the South the day of deliverance from the fear of Indian hostility is more distant, yet it is not too much to expect that three summers of

peaceful progress will forever put it out of the power of the tribes and bands which at present disturb [43] Colorado, Utah, Arizona, and New-Mexico to claim consideration of the country in any other attitude than as pensioners upon the national bounty. The railroads now under construction, or projected with a reasonable assurance of early completion, will multiply fourfold the striking force of the Army in that section; the little rifts of mining settlement, now found all through the mountains of the southern Territories will have become self-protecting communities; the feeble, wavering line of agricultural occupation, now sensitive to the faintest breath of Indian hostility, will then have grown to be the powerful 'reserve' to lines still more closely advanced upon the last range of the intractable tribes." (p. 397.)

"Hualapais.—These Indians numbering about 1500, inhabit the country near the Colorado River, north of the Mohaves, ranging a considerable distance into the interior. They have been and still are more or less hostile. Those who are quiet and peaceable are, with members of other bands of Indians, be-

ing fed by the Government at Camps McDowell, Beal's Spring, and Date Creek." (p. 446.)

The Indians and the Railroads (at p. 463 et seq.):

"The following are the railroads which pass through Indian reservations, and by which the interests of Indians are, or may be, affected."

At p. 465, Atlantic and Pacific, Indian Territory.

At p. 468, Atlantic and Pacific, Navajo Reservation.

In New Mexico, Camp Verde, Arizona, is the only reservation affected.

"The present attitude of some of the Indians on the proposed line of the same is not very favorable for peaceable operations. At the same time the Government can in no way better strengthen itself . . ." (p. 468.) [44]

O. O. Howard's report of November 7, 1872, of his second visit to Arizona:

"A similar order was issued abolishing McDowell, Date Creek, and Beal Spring as Indian reservations or Indian feeding-posts. I deemed it vastly better for the Indians to have fewer reservations." (p. 559, at 560.)

(7) House Executive Document No. 1, Part 5, 43rd Congress, 1st Session, Re-

port of the Secretary of the Interior, October 31, 1873:

"The Government has a twofold object in confining Indians to reservations: to prevent their encroachments upon white settlers, and to isolate them so far as possible from association with white people." (p. vi.)

"Satisfactory progress has been made within the year in the reduction of the area of existing reservations, in the exchange of reservations lying within the range of advancing settlements and railroad construction for other locations equally desirable for all purposes of Indian occupancy, as well as in bringing tribes upon reservations for the first time . . ." (p. vii.)

(8) Report of the Commissioner of the General Land Office for October 20, 1873, Ibid.

At p. 174. Surveyed during fiscal year ending June 30, 1873:

T 20 N	R 22 W	5,759.05	acres	12,800	unsurveyed	mt.	land	
23 N	18 W	22,980.30	"	—				
18 N	5 W	23,004.96	"	—				
18 N	6 W	6,400	"	16,640	"	"	"	

[45]

At p. 286. Estimated quantity embraced in the limits of the Atlantic and Pacific grant, 42,000,000.

Estimated quantity which the company will receive from the grant, 40,000,000.

At p. 299. Statement showing the time when the various railroad rights attach to the lands granted, so far as at present determined.

At p. 301. "Atlantic and Pacific . . . From that point (eastern boundary of New Mexico) to the eastern boundary of California, March 12, 1872."

(9) Report of the Commissioner of Indian Affairs, November 1, 1873, Ibid.

"The comparative weakness of the whites made it expedient, in our early history, to deal with the wild Indian tribes as with powers capable of self-protection and fulfilling treaty obligations, and so a kind of fiction and absurdity has come into all our Indian relations. . . . So far, and as rapidly as possible, all recognition of Indians in any other relation than strictly as subjects of the Government should cease." (p. 371.)

Report of J. A. Tormer (Tonner), Agent at Colorado Reserve, August 30, 1873:

"Since my last annual report the Hualpais have been placed under my charge. This people range through the country north and east of the Majaves . . . It is my intention to remove them to this reservation in October next, where they can be fed with less expense to the Government." (p. 652.)

(10) House Executive Document No. 1, Part 5, 43rd Congress, 2nd Session, Surveyor-General's report, August 13, 1874: [46]

"In the northwest there has been an extension of the fourth and sixth standards north, and exteriors therefrom for the accommodation of miners, and also subdivision of the township covering the town of Cerbat, situated in one of the richest mineral regions west of the Rocky Mountains." (pp. 180-81.)

At p. 181. Indian reservations—necessity for survey of exterior boundaries. Miners went on White Mountain and paid for development, surveying, paying government for claims, before they discovered they were on reserved lands.

At pp. 181-2. Development of territory, mining, cattle raising, agriculture, due to Indian peace.

At p. 186. Surveys in year ending June 30, 1874. T. 22 N., R. 17 W., 23,-009.00 acres public land.

Report of the Commissioner of Indian Affairs, November 1, 1874:

At p. 371. Arrival of Wulapai at agency.

At p. 597. Tonner report, September 25, 1874.

At p. 442 et seq. Schedule showing the names of Indian reservations in the United States. No reservation for Walapai other than Colorado River.

(11) House Executive Document No. 1, Part 5, Vol. 1, 46th Congress, 2nd Session, Report of the Commissioner of Indian Affairs, November 1, 1879.

At p. 324. "Schedule showing the names of Indian Reservations in the United States, agencies, . . . tribes occupying or belonging to the reservation, . . ."

"Colorado River . . Hwualapai . . "

[47]

At beginning of this report (p. 69) is a map of Indian reservations. None is shown in any of the lands here involved.

(12) House Executive Document No. 1, Part 5, 48th Congress, 1st Session, Vol. 1, report of the Secretary of the Interior, 1883:

At p. 214. Surveyor-General's report: "Towns have been laid out and are prospering at Holbrook, Williams, Ash Fork, Peach Springs, and Kingman, and ranchmen . . . are making inquiries and prospecting for the selection and stocking of grazing lands in that section."

(1) The Act of 1918 ratified the results of history, and made it impossible for the executive or judicial branches to extend any Indian reservation, by forbidding further Indian reservations in Arizona. The purpose of this law was to protect Arizona's resources from the mortmain of Indian reservations, and to preserve her taxable wealth and her power to govern. 40 Stat. 570, Title 25, U. S. C. A., Sec. 211; Congressional Record, March 28, 1918, pp. 4194-5*". See also Session Laws, 1935, p. 183, prohibiting expenditures for acquisition of lands outside reservations for Indians in Arizona. [48]

2. Dealings with the Indians.

(a) In 1864, appropriation was made to assist the Indians to locate in "permanent abodes, and to sustain themselves by the pursuits of civilized life" (13 Stat. 180); and in that year Indian Superintendent Poston recommended the establishment of a reser-

vation for the Walapai and others on the lower Colorado. W. P., 33.

(b) Congress established this lower Colorado reservation in 1865. 13 Stat. 569; see also W. P., 36.

(c) This "reservation" was a tract of land "reserved from sale" for a public purpose, an exception made to the application of the otherwise generally applicable public land laws. United States v. Celestine, 215 U. S. 278, 285.

(d) In 1865 and subsequent years appropriations were made for collecting and locating Arizona Indians and civilizing them, e. g., 14 Stat. 512, 514-15; 15 Stat. 219, 222; 16 Stat. 36, 357, 566; 17 Stat. 187, 188, 459.

(e) During the hostilities, 1865-1869, soldiers were sent to protect white settlers, not Indians from the whites. W. P., 41-92. [49]

(f) In 1871 Vincent Colyer ordered the Walapai who were around Beale Springs to be fed there on a temporary reservation, until it could be determined what to do with them (W. P., 93).

(g) The Walapai were by orders of officers of the Interior Department taken to their reservation on the lower Colorado in April, 1874, but after a year there, ran away (W. P., 96-114), continuing their wandering life (W. P., 115-128, 139-46).

(h) Subject to presidential approval, General Willcox ordered a military reservation set aside, July 8, 1881 (W. P., 135). Presidential approval was not given for a military reservation; but on January 4, 1883, an Indian reservation was ordered set aside (W. P., 146).

(i) The reservation was not suitable for the Indians, or much used by them (W. P., 147-71, 201-3, 204, 208).

(j) No Indian reservation was ever made for Walapai except the lower Colorado reserve in 1865, the small Beale Springs feeding post in 1871, and the reservation of January 4, 1883. House Executive Document No. 1, Part 5, Vol. 1, 42nd Congress, 3rd [50] Session (1872), The Indians and the Railroads (at 463 et seq.), lists the only reservations affected by or affecting the Atlantic and Pacific as Indian Territory, a Navajo reservation, and Camp Verde reservation (see 465, 468). General Howard had abolished Beale Springs as a reservation or feeding post, deeming it "vastly better for the Indians to have fewer reservations." (p. 559, at 560.)

House Executive Document No. 1, Part 5, Vol. 1, 43rd Congress, 1st Session. The plan was to move the Walapai to the lower Colorado reservation in October, 1873 (see Tonner report, at p. 652).

House Executive Document No. 1, Part 5, 47th Congress, 1st Session (1881), Vol. 1, page 1. Indian office map of Indian reservations shows none such as is claimed in this suit. At pp. 36-7 Walapai history is reviewed showing nothing such as plaintiff claims. A table at p. 319 shows all Indian reservations. The Walapai are listed as belonging to the lower Colorado reserve. Similar table appears in House Executive Document No. 1, Part 5, 47th Congress, 2nd Session, Vol. 2 (1882), at 362. [51]

(k) Dealings with Indians by the Interior Department under direction of the President, not contrary to law, are authorized. Act of July 9, 1832 (4 Stat. 564); Act of March 3, 1849 (9 Stat. 395); Section 2, Title 25, U. S. C. A.; but since 1871 dealings by treaty have been forbidden. 16 Stat. 544, 566; Section 71, Title 25, U. S. C. A.

(l) The general allotment act of February 8, 1887 (24 Stat. 389), recognized Indians had rights only inside reservations, could procure rights outside reservations only by purchase.

(m) In addition to dealing with Indians directly, Congress and the Interior Department by their policies with respect to land and settlers (outlined above), and with respect to the Atlantic and Pacific and defendant (outlined below), manifested their

affirmative policy that Indians had no recognized soil right inconsistent with defendant's ownership.

3. Dealings with railroad lands.

(a) The Act of July 27, 1866, was a present grant of the lands in issue, which became effective by [52] relation to the date of the act when the map of definite location, filed and accepted March 12, 1872, as alleged by plaintiff, identified them.

United States v. Southern Pacific R. R. Co., 146 U. S. 570, 593;

16 Ops. Atty. Gen., 572;

17 Ibid., 251;

Buttz v. Northern Pacific Railroad, 119 U. S. 55;

Lucero v. Atlantic & Pac. R. R. Co., 32 L. D. 85.

(b) The Commissioner of the General Land Office confirmed the effect of the grant by withdrawing from other disposition the odd-numbered sections within the grant limits on May 17, 1872. Statement Showing Land Grants Made by Congress, Government Printing Office, 1915, 18; see also 7 L. D. 405.

(c) The surveying, grading, construction, and acceptance of the Atlantic and Pacific was reported by the President to Congress through the medium of Interior Department reports, as developments occurred.

(1) House Executive Document No. 1 Part 5, 42nd Congress, 3rd Session, 1872. Commissioner of the General Land Office reports filing of Atlantic and Pacific maps indicating the line of the road "through New Mexico and Arizona to the Colorado River at a point near Fort Mohave." (p. 31.)

[53]

(2) House Executive Document No. 1, Part 5, 43rd Congress, 1st Session, 1873, at 301. Rights of the Atlantic and Pacific attached to the lands granted in Arizona on March 12, 1872. This notation is made in reports of subsequent years, e. g., 1879 report at 629, 1880 report at 639, 1881 report at 182.

(3) House Executive Document No. 1, Part 5, 46th Congress, 3rd Session, 1880, at 46. The Atlantic and Pacific "has been revitalized, and has begun the construction of its road west of Albuquerque, N. Mex." (Report of Public Lands Commission.) See also Report of the Commissioner of the General Land Office, at 434, and of Surveyor-General of New Mexico, at 1030.

(4) House Executive Document No. 1, Part 5, 47th Congress, 1st Session, 1881, at xvi, xvii, 125. Complete con-

struction across New Mexico and into northeastern Arizona reported.

(5) House Executive Document No. 1, Part 5, Vol. 1, 47th Congress, 2nd Session, 1882. Commissioner [54] of Railroads reports inspection as far as Canyon Diablo, and construction 96 miles beyond to a point 157 miles from the Needles. Also acceptance by the President of 200 miles, and appointment of commissioners to examine 200 miles more.

(6) House Executive Document No. 1, Part 5, 48th Congress, 1st Session, Vol. 1, 1883, Surveyor-General's report. "During the fiscal year this road has been extended from the Canon Diablo to the Colorado River, a distance of 263 miles." (p. 214.) See also Report of Commissioner of Railroads, 505-7, and Appendix 1, p. 511, at 529-32, showing grant lands available.

(d) The President, through transmission of Interior Department reports, regularly reported to Congress that the Atlantic and Pacific rights, vested in 1872, could not be forfeited except by act of Congress.

(1) House Executive Document No. 1, Part 5, 44th Congress, 1st Session, at 72: For forfeiture an act of Congress or judicial declaration is necessary. [55]

(2) House Executive Document No. 1, Part 5, 45th Congress, 2nd Session (1877). The report of the Commissioner of the General Land Office comments on railroad land grants subject to forfeiture by act of Congress or judicial proceedings, and recommends legislation extending time (pp. 12-13). These comments are repeated in 1878 and 1879. Full report was made on the subject in 1880, House Executive Document No. 1, Part 5, 46th Congress, 3rd Session, at 515; and the Secretary of the Interior and Commissioner of the General Land Office renewed the subject in 1882, House Executive Document No. 1, Part 5, Vol. 1, 47th Congress, 2nd Session, at xxxii and 10. House Executive Document No. 1, Part 5, 48th Congress, 1st Session, Vol. 1, 1883, the Secretary of the Interior reported "Congress alone can relieve the settler by declaring the lands forfeited" (p. xxxiv), and the Commissioner of the General Land Office made it [56] clear that no executive power of forfeiture was possessed or had been exercised (pp. 14-23).

(e) The act of 1876 (19 Stat. 121), and "An act to provide for taxation of railroad grant lands, and for other purposes," ap-

proved July 10, 1886 (24 Stat. 143), required railroads to pay surveying costs; and the act of 1910 (36 Stat. 834), required their payment before survey, to enable completion of land-grant adjustments and render lands more speedily subject to taxation. In proceeding under the act of 1887 (24 Stat. 556), to adjust defendant's land grant, and under the other acts cited, the Secretary of the Interior in demanding survey moneys and making surveys was adjudicating and confirming defendant's title pursuant to Congressional policy.

Santa Fe Pacific R. R. Co. v. Lane,
244 U. S. 492, 496;

Senate Report 609, 61st Congress, 2nd Session. *[9] (a)

Bates & Guild Co. v. Payne,
194 U. S. 106.

(f) The issuance of patents to lands in the second cause of action, as alleged by plaintiff, was upon decision of duly authorized executive department that defendant's title was perfect; every presumption is [57] indulged in favor of the correctness of its actions; and they can be overturned only for fraud or imposition, which are not alleged.

Diamond Coal Co. v. United States,
233 U. S. 236, 239;

United States v. San Jacinto Tin Co.,
125 U. S. 273, 300;

Maxwell Land-Grant Case,
121 U. S. 325, 381-2;
United States v. Stinson,
197 U. S. 200, 204-5;
United States v. Clarke,
200 U. S. 601, 608.

(g) Congress has confirmed defendant's title to lands in Arizona:

(1) By the act of 1871 (17 Stat. 9), permitting mortgage and restricting mortgagees' rights to lands opposite completed sections at time of foreclosure.

(2) By the act of July 6, 1886 (24 Stat. 123), forfeiting the grant opposite UNCOMPLETED SECTIONS, and the act of July 10, 1886 (24 Stat. 143), providing for payment of surveying costs and for taxation after survey of lands opposite COMPLETED SECTIONS.

(3) By the act of 1897 (29 Stat. 622), authorizing foreclosure sale and purchase, requiring quitclaim of lands opposite unconstructed sections. [58]

(4) By the act of 1902 (32 Stat. 405), giving defendant the right to lease or sell to The Atchison, Topeka and Santa Fe Railway Company but stipulating for retention of the right of the United States to land-grant rate advantages and that the land should "remain as

now" subject to Territorial and later to State taxation.

(5) By taking for the United States benefits in the nature of land-grant rate reductions.

Act of March 3, 1875 (18 Stat. 453, Title 10, Sec. 1375, U. S. C., troops and property);

Act of July 28, 1916 (39 Stat. 430, subdivision 30, Title 39, Sec. 552, U. S. C., mail).

See regulations covering transportation over land-grant and bonded railroads, and the settlement of accounts for such service, Government Printing Office, 1899, and subsequent issues of such regulations, for maps and tables showing the Atlantic and Pacific line as subject to deductions.

(h) Railroad right and Indian no-right outside reservations was recognized by the act of March 4, 1913 (39 Stat. 1007), "An act for the relief of Indians occupying railroad lands in New Mexico, Arizona, or California"; by the act of June 22, 1874 (18 Stat. 194), "An act for the relief of [59] settlers on railroad lands," and its extension in 1890 (26 Stat. 369); by the act of August 4, 1922 (42 Stat. 829), "An act to permit adjustment of conflicting claims to certain lands in Mohave County."

(i) Both Congress and the executive have recognized that the grant did not attach to odd-numbered sections in reservations created prior to the filing of map of definite location, but did attach to lands over which reservations were established subsequent to the filing of such map.

Act of April 21, 1904 (33 Stat. 211);

Atlantic & Pacific R. R. Co. v. Willard, 17 L. D. 554;

Regulations under act of April 21, 1904, 34 L. D. 666;

Santa Fe Pacific R. R. Co., 35 L. D. 83 (Zuni and Navajo reserves);

Santa Fe Pacific R. R .Co., 41 L. D. 96 (Moqui reserve);

House Report 1446, 68th Congress, 2nd Session, W. P., 206-7;

Act of February 20, 1925 (43 Stat. 954).

(j) From March 12, 1872, to the inception of this lawsuit the United States has treated the Atlantic and Pacific Railroad as owner of the odd-numbered sections in the Walapai reservation.

Act of April 21, 1904 (33 Stat. 211);

Extract from Report of Board of Indian Commissioners, 1924, W. P., 204-5;

House Report 1446, 68th Congress, 2nd Session, W. P., 206-7;

Act of February 20, 1925 (43 Stat. 954), W. P., 206;

Statement of D. H. Watson to Senate, May 22, 1931, W. P., 283, at 285;

Indian Commissioner Scattergood's statement to Senate Committee, May 22, 1931, W. P., 303;

Opinion of Interior Department, E. C. Finney, September 16, 1931, [60] W. P., 319;

Opinion of Assistant Attorney General Richardson, November 12, 1931, W. P., 325.

The agreement referred to in Commissioner Scattergood's statement was effectuated in part by the stipulation filed in this Court in United States of America, Plaintiff, v. The Atchison, Topeka and Santa Fe Railway Company, a corporation, defendant, No. L-388 Prescott, dated July 31, 1931, upon which this Court entered judgment in said cause on July 7, 1931, as follows: "and said The Atchison, Topeka and Santa Fe Railway Company and/or Santa Fe Pacific Railroad Company, a corporation organized and existing under the laws of the United States, all of the capital stock of which, except directors' qualifying shares, is owned by said The Atchison, Topeka and Santa Fe Railway Company, having reached a satisfactory understanding

and agreement with the United States of America for the use and benefit of the Walapai or Hualapai Indians pursuant to authority contained in the Act of Congress of February 20, 1925, (43 Stat. 954) entitled 'An Act to provide for exchanges of Government and privately owned lands in the Walapai Indian Reservation, Arizona,' for the exchange and consolidation of large areas of lands of the respective parties, including the lands and waters concerned in this action, lying within the Walapai or Hualapai Indian Reservation in the State of Arizona, the plaintiff and the defendant in the action above numbered and entitled do hereby stipulate, subject to the approval of the Court, that judgment shall be rendered for the Plaintiff in this cause fixing the respective rights and titles of the parties as follows."

G. The non-recognition of any Walapai right, conclusively shown by acts of Congress and the executive, is a political fact which the judicial power may not disregard.

Shoshone Tribe v. United States,
299 U. S. 476, 495-6;
Super v. Work, 3 Fed. (2d) 90, 91, affirmed,
271 U. S. 643;

Barker v. Harvey, 181 U. S. 481; [61]
United States v. Title Ins. Co.,
265 U. S. 472;
Klamath Indians v. United States,
296 U. S. 244;
Sioux Indians v. United States,
277 U. S. 424, 436;
Beecher v. Wetherby, 95 U. S. 517, 525;
Conley v. Ballinger, 216 U. S. 84, 90. [62]

II.

ANY WALAPAI RIGHT OR TITLE HAS BEEN EXTINGUISHED (SUPPORTING PARAGRAPHS I AND II OF MOTION).

A. Extinction of Indian right may be by simple fiat of the sovereign.

Spalding v. Chandler, 160 U. S. 394, 407;
Missouri, Kansas & Texas Ry. Co. v. Roberts,
152 U. S. 114, 118;
Kindred v. Union Pacific R. R. Co., 225 U. S.
582;
Nadeau v. Union Pacific R. R. Co., 253 U. S.
442, 446;
Conley v. Ballinger, 216 U. S. 84.

B. Any Walapai title or right was extinguished prior to July 27, 1866.

1. The acts of Congress which threw all the territory open to settlement by extending the land laws and protecting settlers by the military

operated as a withdrawal of any recognition of Indian right.

United States v. Repentigny, 5 Wall. 211, 267-8;

Johnson v. McIntosh, 8 Wheat. 543, 587, 588-90;

See also citations under point I, subsection D;

Report of the Secretary of the Interior for 1860, S. Ex. Doc. 1, 36th Cong., 2nd Sess., p. 34.

"The government is free to pursue such a policy as circumstances may render expedient, . . . " ". . . impressing upon them the necessity of maintaining friendly relations with the whites, and assuring them that acts of violence and rapine will be sure to draw upon them severe chastisement."

2. All subsequent history of ignoring Indian claim and confirming railroad and settler rights confirms the conclusion that any recognition of Indian claim was withdrawn. [63]

Tiger v. Western Investment Co., 221 U. S. 286, 306;

United States v. Jackson, 280 U. S. 183, 196-7;

United States v. Union Pac. R. R. Co., 148 U. S. 562, 572;

Swayne and Hoyt, Ltd., et al. v. United States, 300 U. S. 297, 301;

Northern Pac. Ry. Co. v. Wismer, 246 U. S. 283, 287-8;

3. Indian Superintendent Poston in 1864 agreed with the Walapai that he would recommend for them a reservation; they agreed to go upon it; Congress set aside the reservation recommended in 1865.

13 Stat. 559;

Walapai Papers, p. 33;

Congressional Globe, March 2, 1865.*[10]

4. The reservation was an exemption of certain lands, devoted to a public purpose, from the land laws, which were applicable to the balance of the lands of Arizona.

United States v. Celestine, 215 U. S. 278, 285.

5. Removal of the Walapai was the plan of the Indian Department, though consummation was delayed.

Report of the Commissioner of Indian Affairs, 1866, in H. Ex. Doc. No. 1, 39th Cong., 2nd Sess., p. 27.

6. Surveying was being undertaken and settlers were coming in to the territory prior to 1866.

Report of the Commissioner of the General Land Office, 1866, in H. Ex. Doc. No. 1, 39th Cong., 2nd Sess., at p. 371.

C. Any possessory right of the Walapai was extinguished prior to March 12, 1872.

1. There was continuous warfare against the Walapai in 1865-1869, W. P., 41-92. [64]

2. Any Indian claims were ignored.
   Report of the Commissioner of Indian Affairs, 1869, in H. Ex. Doc. No. 1, Part 3, 41st Cong., 2nd Sess., 461.

3. Appropriations for public surveys were continued and two land offices were opened.

4. Mr. Vincent Colyer, after the close of hostilities, ordered the Indians to be fed on a small temporary reservation at Beale Springs, being unable to do more until it should be determined what section of the country would be desired by white people. W. P., 93. Mr. Colyer apparently had overlooked the fact that Congress had selected a reservation for the Walapai. The policy to remove the Walapai was delayed until 1874. W. P., 96.

D. Congressional and executive acts since March 12, 1872, were of such character as to extinguish any Walapai right inconsistent with defendants' title not theretofore extinguished.

1. The history reviewed under point I is referred to.

2. The executive reservation for defendant of all lands in issue on May 17, 1872, was evidence

of withdrawal of any recognition of Indian claims; for such action was predicated upon prior status of all the lands as public domain, and [65] subsequent status of even-numbered sections as public domain, of odd-numbered sections as railroad property.

E. The Walapai have surrendered any claims they may once have asserted inconsistent with defendant's title.

1. The agreement of the Indians with Poston in 1864 was a cession of claim, if cession were necessary, because thereafter the political departments of the Government considered the Walapai as without any right to the lands here in dispute.

   Buttz v. Northern Pacific Railroad, 119 U. S. 55, 69-70.

2. Even though the Indians' claim was not recognized, its relinquishment was sufficient to bar their further asserting it.

   Ute Indians v. United States, 45 Ct. Cl. 440.

3. Long acquiescence by the Indians in the railroad and settler rights constitutes an abandonment of their claims, if any.

   Johnson v. McIntosh, 8 Wheat. 543, 590;
   United States v. Cook, 19 Wall. 591, 593;
   Beecher v. Wetherby, 95 U. S. 517, 526;
   Williams v. City of Chicago, 242 U. S. 434, 437.

F. The Walapai have received from Congress amounts deemed by it appropriate and just. W. P., 357-9.

G. Any rights the Walapai may have had were lost by their failure to present claims to [66] the Court of Private Land Claims created by the act of March 3, 1891.

1. Prior to the act of 1891 Congress had reserved to itself decision as to what Mexican and Spanish claims were valid.

   Tumacacori and Calabazas Grant, 16 L. D. 408;

   Astiazaran v. Santa Rita Mining Co., 148 U. S. 80.

2. The act of 1891 required on penalty of forfeiture that imperfect claims be presented. There could be no more imperfect claim than Indian claim based on occupancy; and failure to present any Walapai claims that may have existed has completely barred their assertion.

   Minturn v. Brower, 24 Cal. 644, 663;

   Botiller v. Dominguez, 130 U. S. 238;

   Barker v. Harvey, 181 U. S. 481, 490-93;

   United States v. Title Insurance and Trust Co., 265 U. S. 472.

H. Upon extinction of the Walapai right, if any they ever had, defendant's title became perfect regardless of time or method of extinction; for defendant's least possible right was the fee burdened

by Indian occupancy; and when the United States removed the occupancy burden, neither Indians, defendant, nor this Court could question the means; and defendant's fee became the only interest in the land.

Buttz v. Northern Pacific Railroad, 119 U. S. 55;

Klamath Indians v. United States, 296 U. S. 244;

Sioux Indians v. United States, 277 U. S. 424, 436;

Beecher v. Wetherby, 95 U. S. 517, 525;

Conley v. Ballinger, 216 U. S. 84, 90;

Shoshone Tribe v. United States, 299 U. S. 476, 495-6. [67]

III.

DEFENDANT'S TITLE HAS BEEN VESTED AND CONFIRMED BY THE POLITICAL AUTHORITIES IN SUCH MANNER THAT IT IS BEYOND CHALLENGE (SUPPORTING PARAGRAPHS II, III, AND IV OF MOTION).

A. The plaintiff has, by vesting title in defendant, precluded attack on that title.

1. The history and authorities reviewed under point I are here referred to.

2. The Department of the Interior has conclusively determined that the lands in issue were included in the grant, and that no facts, or proper applications of law to facts, excepted the lands from the grant.

(a) The Department of the Interior was required, in adjusting the Atlantic and Pacific grant, to determine all questions of fact and law necessary in identifying defendant's lands, and demand the cost of surveying the lands so adjudicated as belonging to defendant. Act of March 3, 1887 (24 Stat. 556), Act of June 25, 1910 (36 Stat. 834). Santa Fe Pacific R. R. Co. v. Lane, 244 U.S. 492, 496. See also *9(a).

(b) The Department of the Interior's determination of the defendant's ownership of the lands in the [68] first cause of action (see ante, pp. 35-6) is conclusive, because (a) it was within the jurisdiction of the department, (b) it involved conclusive fact determinations, discretionary political determinations not reviewable by courts, and determinations of mixed questions of fact, executive discretion, and law, and (c) no suggestion of lack of jurisdiction, inadvertence, or fraud is pleaded or historically present.

Bates & Guild Co. v. Payne, 194 U. S. 106, 108-9;

Lane v. Watts, 234 U. S. 525;

Shaw v. Kellogg, 170 U. S. 312;

Knight v. United States Land Assn., 142 U. S. 161, 177-8, 181;

Lane v. Hoglund, 244 U. S. 174.

(c) The same considerations render final the adjudications evidenced by patent in the second cause of action.

Burke v. Southern Pacific R. R. Co., 234 U. S. 669;

Burfenning v. Chicago, St. P., M. & O. Ry. Co., 163 U. S. 321;

Germania Iron Co. v. United States, 165 U. S. 379;

Diamond Coal Co. v. United States, 233 U. S. 236;

McCaskill Co. v. United States, 216 U. S. 504.

3. By disposing of all the lands in the issue to defendant for a price, and by repeatedly confirming in defendant both the rights and the burdens of its grant, Congress and the executive have vested [69] title to the lands in defendant in such a way that Congress itself (although it has not attempted any such thing, and its latest action, in 1925, confirms defendant's title), or any court, can not divest such title.

United States v. Creek Nation, 295 U. S. 103, 110;

Shoshone Tribe v. United States, 299 U. S. 476, 495-6;

Burke v. Southern Pacific R. R. Co., 234 U. S. 669, 680;

United States v. Northern Pac. Ry. Co., 256 U. S. 51, 64;

Payne v. Central Pacific R. R. Co., 255 U. S. 228, 236-7;
Sinking Fund Cases, 99 U. S. 700, 719;
Perry v. United States, 294 U. S. 330.

B. The lands of the second cause of action were not reserved for the Walapai by any acts performed by government agents between 1852 and 1872.

1. The expedition of Captain Sitgreaves was directed by the Corps of Topographical Engineers to study the geography of the region. Senate Executive Document No. 59, 32nd Congress, 1852-3, Vol. 10, page 4.

2. The Pacific Railroad Surveys (see Act of March 3, 1853, Sec. 10, 10 Stat. 214, at 219) were "to ascertain the most practicable and economical route for a railroad from the Mississippi River to the Pacific Ocean."

3. Among Lieutenant Whipple's instructions appeared the following: "Great attention will be given to those collateral [70] branches of science which more or less directly affect the solution of the question of location for the proposed railway: the nature of the rocks and soils, the means of obtaining water . . .; the products of the country . . .; its population and resources; its supply of timber and other materials . . .; the location, character, habits, tradition, and language of the Indian tribes."

House Executive Document No. 129, 33rd Congress, 1st Session, 1853-4, Vol. 18, Part 2, page 6. He had and presumed to exercise no authority to set aside any reservations for Indians; never located Walapai.

4. S. F. Beale in surveying a wagon road from Fort Defiance to the Colorado River had no authority and did not purport to set aside a reservation. House Executive Document 124, 35th Congress, 1st Session. He never mentioned Walapai.

5. Ives saw some Indians on Diamond Creek he thought to be Walapai; but there is no suggestion that he had or purported to exercise authority to set aside a reservation for them. Ives, Report Upon the Colorado River of the West, explorations in 1857 and 1858. See W. P., 15 et seq. [71]

6. Lieutenant George M. Wheeler's expedition was for the "main object" of exploring to "obtain correct topographical knowledge of the country . . . and to prepare accurate maps of that section. In making this the main object, it is at the same time intended that you ascertain as far as practicable everything relating to the physical features of the country, the numbers, habits, and disposition of the Indians who may live in this section, the selection of such sites as may be of use for future military operations or occupation, and the facilities offered for mak-

ing rail or common roads, to meet the wants of those who at some future period may occupy or traverse this part of our territory." Preliminary Report of Explorations in Nevada and Arizona, 1871, supra, page 3. No authority was given or purported to be exercised of setting aside any reservation for Indians. Wheeler's activities were pursuant to the policy of controlling the country for white settlement. See history heretofore given, particularly pages 17-19.

7. Vincent Colyer's action in 1871 does not establish, but negatives, recognition of any Walapai right. W. P., 93. [72]

8. Walapai Papers, styled by plaintiff's attorney in the oral argument on defendant's Motion for Further Particulars as the Government's written evidence in this case, does not support but negatives the pleading that a reservation was made for the Walapai.

9. The whole summary of history heretofore made negatives the pleading.

C. The executive order of January 4, 1883, and the earlier unconfirmed military order of 1881 did not operate to reserve for Indian use the odd-numbered sections in the Walapai Indian Reservation, or affect defendant's vested title thereto.

1. Until Congress passed the act of 1886 forfeiting the grant opposite unconstructed portions of the line, Congress was expecting the railroad

to be built, the Atlantic and Pacific Railroad Company had the right to build it, and its title remained vested and became unconditional as respects all lands opposite constructed and accepted portions.

United States v. Southern Pac. R. R. Co., 146 U. S. 570, 595, 604-5;
16 Ops. Atty. Gen., 572;
17 Ops. Atty. Gen., 251;
McGrath v. Atlantic &. Pac. R. R. Co., 1 L. D. 328;
Schulenberg v. Harriman, 21 Wall. 44, 66, 63-4;
Missouri, Kansas & Texas Ry. Co. v. Kansas Pacific Ry Co., 97 U. S., 491, 496-8;
St. Paul & Pacific R. R. Co. v. Northern Pacific R. R. Co., 139 U. S. 1, 6;
Stark v. Starrs, 6 Wall. 402, 418. [73]

2. The title to the lands having passed to defenddant on March 12, 1872, and remaining there, and having been both by operation of law and by act of the Interior Department reserved to defendant, and Congress never having forfeited, the executive acts purporting to set aside the Walapai Indian Reservation could not and did not affect defendant's title.

Van Wyck v. Knevals, 106 U. S. 360, 367;
Buttz v. Northern Pacific Railroad, 119 U. S. 55, 72;
Tumacacori and Calabazas Grant, 16 L. D. 408, 420-22;

Wilcox v. McConnell, 13 Pet. 498, 513;
Leavenworth, Lawrence & Galveston R. R. Co., v. United States, 92 U. S. 733, 745;
Santa Fe Pacific R. R. Co. v. Lane, 244 U. S. 492;
United States v. Minnesota, 270 U. S. 181, 209-10.

D. Plaintiff does not have title by limitation to the lands of the first cause of action.

1. A twenty-year period of limitation is not provided by any statute of Arizona or of the United States.

2. Up until the inception of this suit it has heretofore been shown that as a matter of public record the United States and the Department of the Interior fully recognized defendant's title; hence, such possession as may be proved was not adverse and is not presumed adverse.

Montana Lumber Co. v. United States, 196 U. S. 573;
2 Tiffany on Real Property, 2nd Ed., Sections 502, 506; [74]
United States v. Board of National Missions, 37 Fed. (2d) 272, 274;
Collins v. Riley, 104 U. S. 322;
Ricard v. Williams, 7 Wheat. 59, 107-8.

3. There is no basis for presumption of a lost grant since the history of the whole title is clear, and there is no basis for presuming a grant from the United States to the Indians or

a grant from the defendant or its predecessor in title to the Indians or to plaintiff.

Ricard v. Williams, 7 Wheat. 59, 109-10;
Fletcher v. Fuller, 120 U. S. 534, 550;
United States v. Chavez, 175 U. S. 509,521.

4. There has been no continuous adverse possession in fact.

Walapai Papers, pp. 208, 288;
2 Tiffany on Real Property, 2nd Ed., Sections 506, 502.

5. The United States having always admitted defendant's title, the Indians were and are incapable of taking a different position.

Heckman v. United States, 224 U. S. 413, 444-5.

6. Defendant was justified in relying upon the United States' concession of its title.

Curtner v. United States, 149 U. S. 662;
United States v. New Orleans Pacific R. R. Co., 248 U. S. 507.

E. The United States is barred by the equities.

1. The United States, invoking the aid of equity, subjects itself to the application of equitable principles. [75]

The Western Maid, 257 U. S. 419;
United States v. Stinson, 197 U. S. 200, 203-4;
Brent v. Bank, 10 Pet. 569, 614;
Pan American Co. v. United States, 273 U. S. 456, 506;
Iowa v. Carr, 191 Fed. 257, 266;
Walker v. United States, 139 Fed. 409, 413.

2. The United States is estopped. Congress itself, and the executive, pursuant to law, having vested defendant's title, required it to pay taxes and cost of surveying, and carry government freight at land-grant rates, have estopped plaintiff from questioning defendant's title.

United States v. Winona and St. P. R. R. Co., 165 U. S. 463, 474-5;

United States v. Grand Rapids R. R. Co., 154 Fed. 131, 136-8; affirmed, 165 Fed. 297, 303-4;

United States v. Creek Nation, 295 U. S. 103;

Shoshone Tribe v. United States, 299 U. S. 476;

United States v. Chicago, M. & St. P. Ry. Co., 218 U. S. 233.

3. Defendant is a bona-fide purchaser for value under general equity rules, having purchased under the assurance of the acts of the executive and acts of Congress, and being entitled to rely on the knowledge and good faith of Congress.

United States v. Des Moines, etc., Co., 142 U. S. 510;

United States v. Detroit Lumber Co., 200 U. S. 321, 334, 335, 339;

United States v. Winona and St. P. R. R. Co., 165 U. S. 463, 478-9;

United States v. Koleno, 226 Fed. 180, 183;

United States v. St. Paul, M. & M. Ry. Co., 225 Fed. 27, 31.

For purchase at foreclosure sale on May 4, 1897, with securities and cash belonging to The Atchison, Topeka and Santa Fe Railway Company, of the properties of the [76] Atlantic and Pacific Railway Company, and their subsequent transfer to defendant on June 24, 1897, in exchange for defendant's capital stock and bonds, pursuant to the act of 1897 (29 Stat. 622), see Valuation Docket 625, Atchison, Topeka and Santa Fe Railway Company, 127 I. C. C. 1, at 210, 211, 239, 280-81, 538-48. See also Poor's Manual of the Railroads of the United States, 1897, pp. 275-6, 1284, 1302; Ibid., 1898, p. 282; The Commercial and Financial Chronicle, Vol. 64, for April 3, 1897, at p. 663, for May 8, 1897, at p. 887, and for June 19, 1897, at p. 1180.

4. Defendant is a bona-fide purchaser for value under the act of 1896 (29 Stat. 42), and this circumstance cuts off all rights of the United States, leaving defendant's rights perfect.

United States v. Flint & P. M. Ry. Co., 95 Fed. 551;

United States v. Winona and St. P. R. R. Co., 165 U. S. 463, 474-5;

Logan v. Davis, 233 U. S. 613;

United States v. Chandler-Dunbar Co., 209 U. S. 447.

5. The United States is not entitled to an accounting.

United States v. Whited and Wheless, 246 U. S. 563-4;

United States v. Grand Rapids R. R. Co., 154 Fed. 131, 136-8; affirmed, 165 Fed. 297, 303-4;

United States v. Winona and St. P. R. R. Co., 165 U. S. 463, 481-2;

United States v. Midway Northern Oil Co., 232 Fed. 619 (U. S. D. C., California).

[77]

IV.

THE COURT SHOULD TAKE JUDICIAL KNOWLEDGE OF ALL FOREGOING MATTERS OF FACT AND DISMISS THIS CAUSE (SUPPORTING ALL PARAGRAPHS OF MOTION).

Arizona v. California, 283 U. S. 423, 452;

Nev-Cal Electric Securities Co. v. Imperial Irrigation District, 85 Fed. (2d) 886, 904-5, 906;

Jones v. United States, 137 U. S. 202, 214-16;

Greeson v. Imperial Irrigation District, 59 Fed. (2d) 529, 530-31.

Wherefore, defendant says the cause should be dismissed and all relief denied plaintiff.

Respectfully submitted,

CHARLES H. WOODS,
JOYCE COX,
FENNEMORE, CRAIG, ALLEN & BLEDSOE,
By ROSS F. JONES.

Received copy of foregoing March 31st, 1938.
HARLOW H. AKERS,
Special Attorney,
Dept. of Justice. [78]

APPENDIX 1.

Coues, On the Trail of a Spanish Pioneer, Vol. 2, pp. 409-413. Yabipais Cuercomanches were found by Garces in 1776 from Diamond Creek to the Black Mountains:

> "July 17. I set forth by the southwest, and making a turn to the west, passed over the Sierra de los Pinales that I had named (Sierra) de San Diego, and in the evening arrived at the Arroyo de San Alexo[20]. Today I departed from the road of the going (de la yda, i.e., former route). I went six leagues onward (mas) in the direction said in order to arrive at this arroyo, where I made night, and therein I found a rancheria of Yabipais Cuercomaches, who received me well, on account of the information that they had received from the other Indians,

[20]Arroyo de San Alexo is Diamond creek, or one of the heads of that system of canons, but I cannot locate this Cuercomache rancheria to my satisfaction. The Cuercomaches appear to be a division of Yavapais unknown except for this single mention by our author. Furthermore, we shall have great difficulty in following Garces for the next few days. His language is altogether too short hereabouts to fetch him on to any position whence he can make the northing and the westing presently indicated. I think he must be set to-day over into Mojave

and also because I had in my company two principal Indians of the Jabesua, who were going to trade at the Jamajab, attesting (protextando) therein the peace and harmony recently established. On this day I met four Yabipais who by order of their captain were going to seek me, apprehensive lest some ill had befallen me, in view of my tardiness—an act which proves the great affection he (the captain) had for me.

"July 18. I traveled down the arroyo a league and a half northwest, and then, having gone over some hills, came out upon a little valley that I called (Valle) del Lino for the much wild (flax) that there was, and it gave me great joy, not having seen any since I departed from Aragon. Having traveled three leagues and a half west, I arrived at a rancheria in which they gave me to eat of pinones, with which that land abounds, and made me tarry one day (July 19) in order that others might come to see me. [79]

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county, somewhere north of Peach springs—perhaps at the spring in the collateral canon of Diamond creek down which we have already gone to the Colorado (p. 327). His trail back to Mojave is henceforth entirely north of the route by which he went before, as every place he reaches has a different name, excepting the two main ranges, the Cerbat and Black mountains—his Sierra Morena and Sierra de Santiago. Nevertheless the general trend is the same; the difference is only in details which we cannot satisfactorily make out.

"July 20. I went half a league north to the Aguage de la Rancheria de Santa Margarita; thereafter I traveled two leagues west within sight of (a la vista de) another rancheria, and having passed over the sierra that on my coming I named (Sierra) Morena,[22] I found a well that I called (Pozo) de las Abispas for the many (wasps) that it had. I passed through a valley about four leagues wide, and having gone four leagues more (mas) to the west and one league southwest, I arrived at the rancheria seen (vista), whose captain I had met before; and he went in my company. Here I tarried two days (July 21, 22).

"July 23. I traveled along the skirt of the sierra two leagues, and arrived at a ranche[ria] that had its pozo.[23]

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[22]Here we are confronted with the Cerbat range. This much is certain; but the details given for to-day remain for me unexplained. I cannot point to St. Margaret or Wasp well, nor do I see how Garces crosses the Cerbat range to-day as he says—for we are told to-morrow that he goes two leagues to its summit; what is said of the rancheria sighted is not clear, nor is it quite certain whether he goes 7½ or 11 leagues. I believe that the valley four leagues wide is Hualapais valley, and that our traveler is somewhere on the eastern slope of the Cerbat range, in the vicinity of Isabel spring.

[23]Unidentifiable, as we are not told whether he skirts the Cerbat range north or south; nor are we certain, indeed, whether he is on the east or west side of these mountains. (The Beaumont MS. has sudueste; pub. Doc. prints surueste.)

"July 24. I ascended the Sierra Morena by the east, having traveled to its summit two leagues; thereafter I went one (league) north, and found a rancheria wherein they regaled us; here there are two pozos, and a valley extends on the two sides of the river. This (river) from the Jamajabs upward comes through formidable caxones. In the evening I traveled a league and a half south, and two leagues and a half southwest, and arrived at a rancho that had an aguage; which is yet another (que aun es todavia) of the Cuercomaches.[24]

"July 25. Having traveled two leagues southwest, I came upon the Sierra de Santiago, the which I passed over by the west and northwest, and found a watering-place that I named (Aguage) de Santa Anna; and having gone one

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[24] This day's itinerary is equally confused; I cannot understand his allusions to the Colorado river and its valleys, as well as to its course above Mojave. What he says is perfectly true, but seems out of place; for he is not yet on the Black range, where remarks upon the river valley would be in order. He is in his Sierra Morena, the Cerbat range, which he traverses either through Mineral Park or through Cerbat—most probably the former, as he continues south and west across the head of the Sacramento valley, and at the rancho where he stays to-night is still a couple of leagues northeast of the entrance to Union pass in the Black mountains. The Cuercomache watering-place of which he speaks is not identifiable; there are numerous springs in this vicinity, some of which are now known as Mud, Willow, Cottonwood, and Cane. [80]

league and a half I reached the Rio Colorado; following down the course of which to a distance of yet other two leagues southward I arrived at the Punta de los Jamajabs.[25]" [81]

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[25]This appears to be about the position of Fort Mojave, a few miles above the locality which Garces formerly named San Pedro de los Jamajabs, as we see by what he says beyond, July 26. He seems to have struck the Colorado at Hardyville; whence it is most probable that he crossed the Black mountains—his Sierra de Santiago—by Union pass; though there is another way—a mere trail, not a road—over the mountains which also fetches out at Hardyville. If he made Union pass, his Aguage de Santa Anna is the well-known watering place in that pass. I never heard any other name for it, if it has one.

SCHEDULE OF INDIAN

Reference	Tribe	Description of cession or reservation
Stat. L., Vol. [illegible]	Pojoaque Pueblo	Confirmed by U. S. Dec. 22, 1858; patented 1864; 13,520.38 acres
	Sia Pueblo	Spanish grant 1689; confirmed by U. S. Dec. 22, 1858; patented 1864; 17,511.63 acres
	Sandia Pueblo	Spanish grant 1748; confirmed by U. S. Dec. 22, 1858; patented 1864; 24,187.29 acres
	Isleta Pueblo	Confirmed by U. S. Dec. 22, 1858; patented 1864; [illegible],080.31 acres
	Nambe Pueblo	Confirmed by U. S. Dec. 22, 1858; patented 1864; [illegible],580.33 acres
	Laguna Pueblo	Spanish grant 1689; 125,225 acres
	Santa Ana Pueblo	Confirmed by U. S. Feb. 9, 1876; 17,361 acres
	Zuñi original grant	Spanish grant 1689; 17,581.27 acres
	Moki	Country claimed by them at beginning of their relations with the U. S.
	Walapai	Country claimed by them at beginning of their relations with the U. S.
	Mohave	Country claimed by them at beginning of their relations with the U. S.
	Yuma	Country claimed by them at beginning of their relations with the U. S.
	Cocopa	Country claimed by them at beginning of their relations with the U. S.
	Papago Pima and Maricopa	Country claimed by them at beginning of their relations with the U. S.
	Apache Eastern bands	Country claimed by them at beginning of their relations with the U. S.
	Apache Western bands	Country claimed by them at beginning of their relations with the U. S.
	Sauk and Fox living in Iowa	Land owned and occupied by them in Tama county, Iowa

LAND CESSIONS—Continued.

Description of cession	Number	Date	Area
Here insert date and area			
	674		
	676		
	677		
New Mexico	678		
	679		
	680		
	681		
	682		

No treaty of purchase was ever made with these Indians. Their original claim is here shown on Arizona map No. 1. By Executive order of Dec. 16, 1882, the President set apart a reserve for them, which is shown on Arizona map No. 2.

No treaty of purchase was ever made with the tribe. The U. S. assumed title to their country, the boundaries of which are shown on Arizona map No. 1, and afterwards set apart a reserve for the by Executive order of Jan. 9, 1883, which is shown on Arizona map No. 2.

No treaty of purchase was ever made with the tribe. The U. S. assumed title to their country, the boundaries of which are here shown on Arizona map No. 1. Most of them have been concentrated on a reserve known as Colorado River reservation, shown on Arizona map No. 2.

No treaty of purchase was ever made with the tribe. The U. S. assumed title to their country, the boundaries of which are shown on Arizona map No. 1. Most of them have been concentrated on the Colorado river and Yuma reservations shown on Arizona map No. 2.

Arizona

No treaty of purchase was ever made with the tribe. The U. S. assumed title to their country, the boundaries of which are shown on Arizona map No. 1. Most of them have been concentrated on the Colorado river reservation, shown on Arizona map No. 2.

No treaty of purchase was ever made with these tribes, who have a common origin. The U. S. took possession of their country, the boundaries of which are shown on Arizona map No. 1. Reservations were, however, assigned them, upon which they were concentrated, known as the Papago, Gila River, Gila Bend, and Salt River reserves, all of which are shown on Arizona map No. 2.

The Apache alluded to here as Eastern bands comprised the bulk of the Jicarilla and Mescalero Apache. Their country lay to the eastward of the Rio Grande river, extending into Colorado and Texas, where it overlapped the Kiowa and Comanche claim. A few of them concluded a treaty Oct. 17, 1865, by which they agreed to confederate with the Cheyenne and Arapaho upon a reserve assigned the latter in Indian Territory. Subsequently, by treaty of Oct. 21, 1867, they were confederated with the Kiowa and Comanche upon a reserve assigned the latter tribes in Indian Territory. Those so confederated relinquished their claim to ancestral territory, but they were few in number. No other treaty of purchase was made with these Apache, but those not confederated with the Kiowa and Comanche have been assigned reservations from time to time, all of which are shown on New Mexico map No. 2. The original domain of the Eastern Apache is here partially shown on New Mexico map No. 1, and is fully delineated on special Texas map.

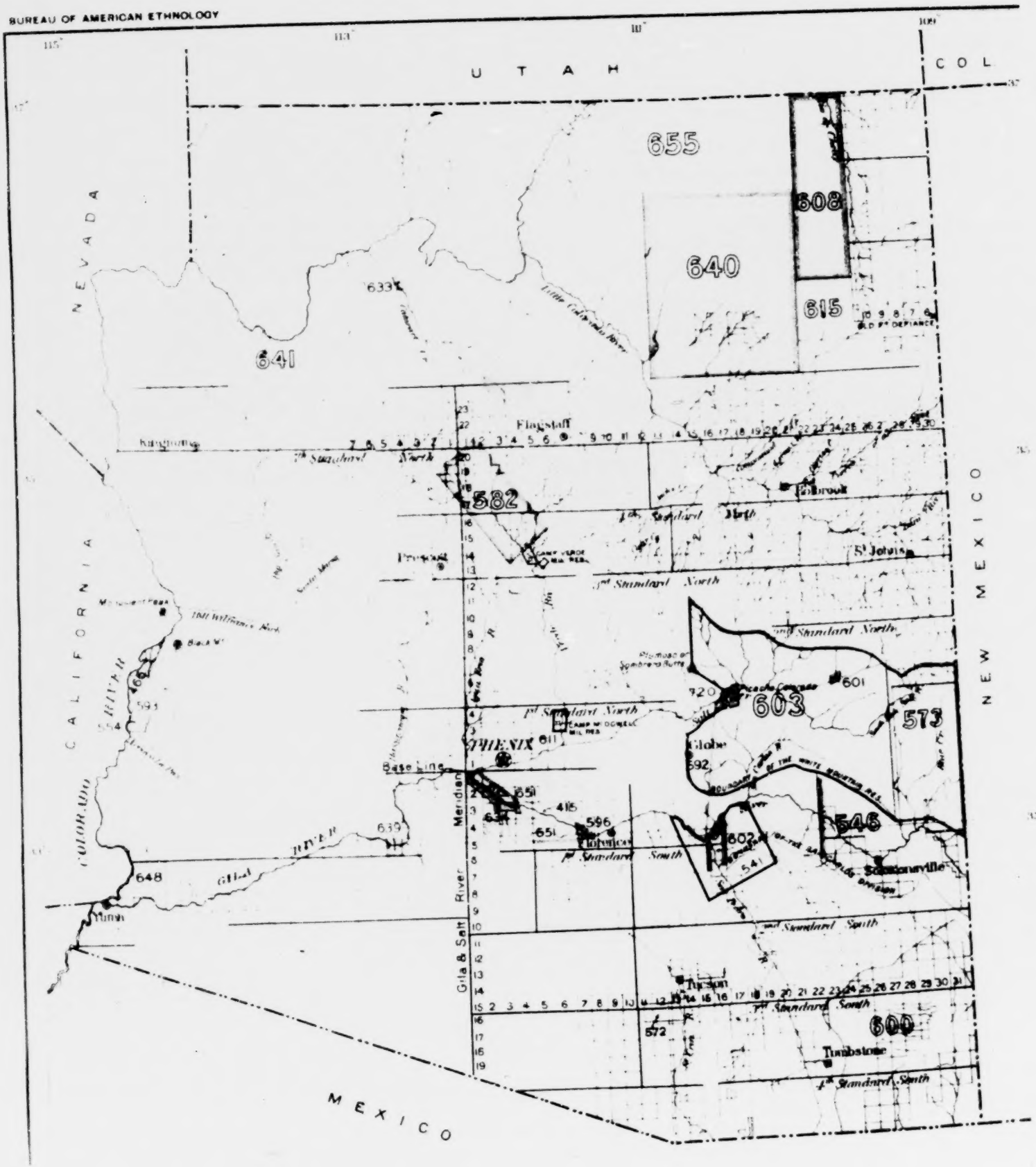
New Mexico

The Apache here alluded to as Western bands comprise all those bands whose ancestral territory lay to the W. of the Rio Grande river, the most important of these bands being the Tonto, Mimbres, Mogollon, Coyotero, Pinal, and a few of the Mescalero and Jicarilla. No treaty of purchase was made with them. The U. S. took possession of the country, assigning them from time to time sundry reservations, the boundaries of which are shown on Arizona and New Mexico maps No. 2. The original domain is here shown on Arizona and New Mexico maps No. 1.

Arizona

These Indians are mostly Fox, and belong properly to the Sauk and Fox of the Mississippi. They formerly resided with their brethren on the tribal reserve in Kansas, but becoming dissatisfied with the allotment of lands on that reserve, they returned to Iowa. Since 1867 they have been paid their

Iowa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Gila & Salt River Meridian
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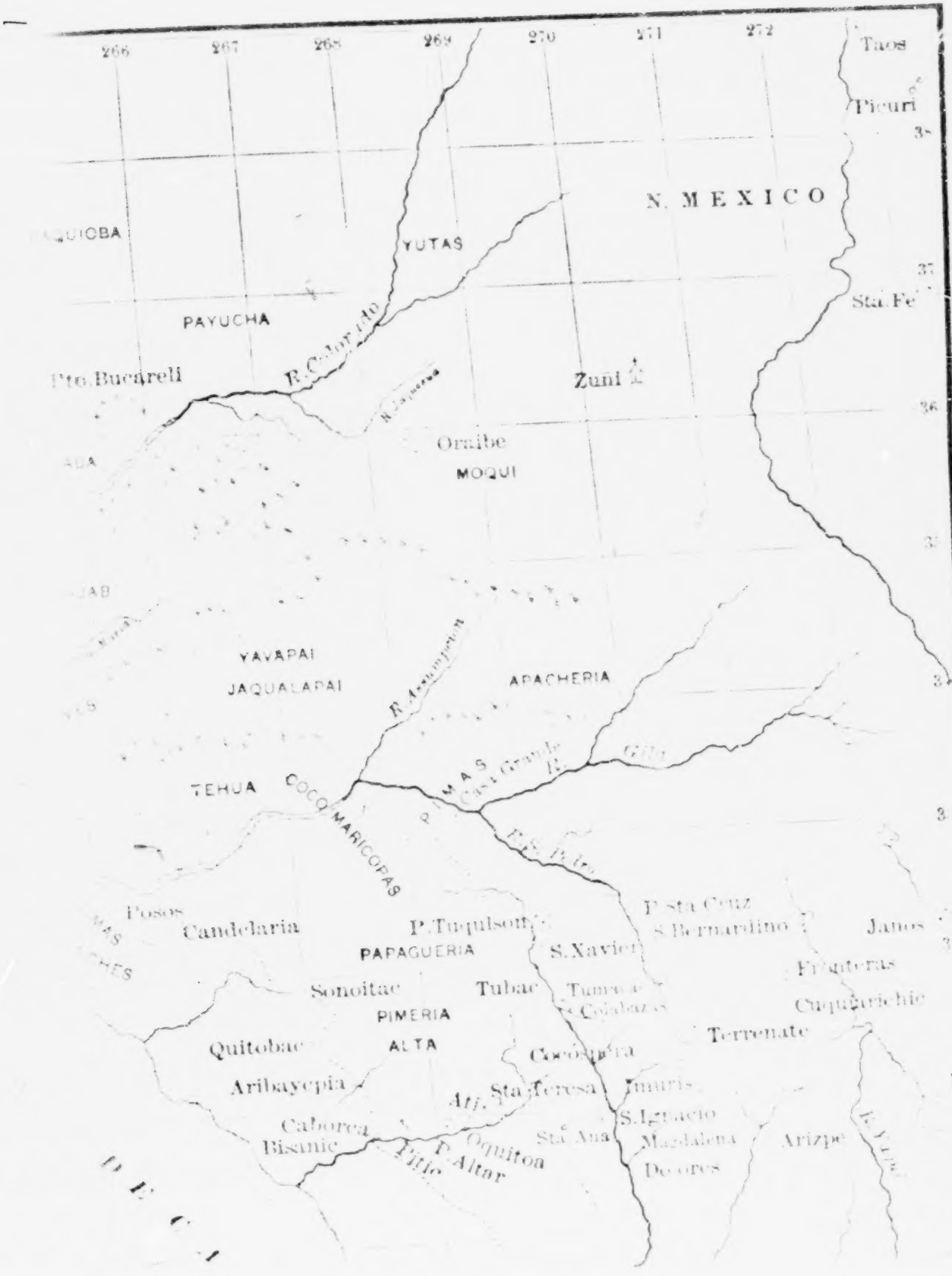
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Taos
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N. MEXICO
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Pto. Bucarelli
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Oraibe
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YAVAPAI
JAQUALAPAI
APACHERIA
TEHUA
COCOMARICOPAS
PIMAS
Gila
Posos
Candelaria
P. Tupulson
PAPAGUERIA
S. Xavier
P. sta Cruz
S. Bernardino
Janos
Fronteras
Sonoitac
Tubac
Tumacacori
Cocleazes
Cuquiarichic
PIMERIA
ALTA
Quitobac
Terrenate
Arivaypia
Sta. Teresa
Caborca
Bisanic
Oquitoa
P. Altar
S. Ignacio
Sta. Ana
Magdalena
Arizpe
Dolores

APPENDIX 4.

Coues, On the Trail of a Spanish Pioneer, Vol. 1, page 224, footnote 31:

"31. Cajuala Sevinta, Cajuala Chemebet, etc. As Garces states, these were evidently names applied to various small Shoshonean tribes. The Sevinta or 'Cajuala Sevinta' were apparently the Shivwits, who occupied the plateau of the same name, bounded by the Grand Wash cliffs, in extreme northwestern Arizona, although they extended into the surrounding region. Some of the Shivwits were seen as far south as Peach spring in 1871. They were a division of the Paiute, and are not popularly distinguished from the rest of that Shoshonean tribe. Beadle called them 'Lee-Biches;' Cortes corrupted Garces' form of the name into Chemequesabinta; Orozco y Berra, Chemegue sebita and Chemegue sevicta. Other forms: Seviches, Sheav-wits, Sherwits. Major J. W. Powell, 1873-74, was the first to call attention to the tribe under its proper name, and probably the first white man to see them after Garces' time. They then numbered 182.

"I do not know the signification of 'Cahuala' in connection with the tribal names. There is a Shoshonean tribe known as Kauvuya, formerly in Cabezon, San Jacinto, and Coahuila valleys, E., S. W., and S. E. of San Bernardino, Cal., and thence extending in straggling bands to the

river Colorado. In 1873 they numbered 1,937 in 13 rancherias. They were later placed on the Mission reservation, where they are still officially regarded as 'Coahuilas.' Other forms: Caguilla, Caqulla, Cahnillo, Cahual-chitz, Cah-wee-os, Cah-willa, Carvilla, Cavio, Caweo, Cohuilla, Cowela, Cowilla, Kahweaks, Kah-we-as, Kah-weyahs, Kavayos, Koahualla.

"Jose Cortes (in Whipple's Report, p. 125-126) has: 'Northward of the river Colorado live other bands, which may be considered as one numerous nation; they are the Chemeque-caprala, Cehmeque-sabinta, Chemequaba, Chemeque, and Payuches (Paiute); all speaking the same language, with the exception of the last.' All of these, except the 'Payuches,' would seem to be divisions of the Chemehuevi, and probably the Shivwits or 'Sabinta' were an offshoot of the same. Both the Shivwits and Chemehuevi are now regarded as Paiute divisions—this is based on linguistic classification by Powell. Cortes' 'Caprala' seems to be the same as Garces' 'Cajuala.' I can identify them with no other than the Kauvuya or 'Coahuila,' who, as previously mentioned, extended to the Rio Colorado. On a Yuma map of the river in Whipple, iii, pt. 3, p. 16, the 'Ca-hual-chitz' are located above Bill Williams' fork (Hah-weal-ha-mook) and the Mohaves.—F. W. H." [86]

APPENDIX 5.

A. W. Whipple, Reports of Explorations and Surveys to Ascertain the most Practical and Economic l Route for a Railroad from the Mississippi River to the Pacific Ocean, made under the direction of the Secretary of War in 1853-54, according to Acts of Congress of March 3, 1853, May 31, 1854, and August 5, 1854, Volume III, 33rd Congress, 2nd Session, Senate Executive Document 78.

In chapter 12 (beginning page 94), the narrative carries the party westerly through Aztec pass and into the Aquarius range of mountains to White Cliff Creek, a tributary of the Big Sandy, where Indian signs and Indians were encountered (at 96). Some distance north of the creek, after following a ravine, camp was made. "The Indians are still lurking about. . . . Leroux supposes these Indians to be Yampais, who range to the junction of Rio Virgin with the Colorado. Towards the northeast are the Cosninos. South of them, and to the Gila, the Tontos are supposed to roam." (at 97.) Some Indians came to camp. "Our new friends confirmed our ideas regarding the locality of some of the Indian tribes. Cosninos, they said, roamed to the Northeast; Pai-Utes lived northwest, upon the further side of the Colorado. They professed to be Yampais; or, as they pronounced it themselves, "Ya-ba-pais." (97-8.)

Having located and named "Cactus," a pass north of White Cliff Creek (98), Whipple went down White Cliff Creek to the Big Sandy (100).

Between the mouth of the Santa Maria and the Colorado, Whipple reports information that (a) demonstrates he was conscious of the Walapai as a group distinct from Yampais and (b) affords an example of a visitation which increased competition for water and food sources, inducing wandering and conflict:

"We could only make out that war, or some other calamity, had visited all the Indians of the Colorado from the Gulf upwards, viz: the Cocopas, Comoyeis, Cuchans, Ya-va-pais, Chem-e-hue-vis, Mac-ha-vis, Ca-hual-chitz, Mat-hat-e-vatch, and Hual-paich. They have suffered greatly for want of clothing and food, which, during the troubles, they had not been able to produce." (at 110.) [87]

APPENDIX 6.

Papers of the Archeological Institute of America, Part I of Final Report of Investigations among the Indians of the Southwestern United States, carried on mainly in the years from 1880 to 1885, by A. F. Bandelier, pp. 30-33.

> "Entirely different was the fate of the Indian in the mountains. There it was, above all, linked to the distribution of water. Scarcity of permanent water is one of the dark sides of many regions in the Southwest; wherever water appeared to be in permanence, therefore, it created a tendency to remain and to settle. The

approach of others to the same spot caused dispute, estrangement among people of the same stock, secessions, warfare, displacements. Water was the most powerful agent which propelled the settlement of these regions; at the same time, it was the most immediate cause for strife and disturbances." (p. 30.)

"It is difficult to trace the migration lines of the Indians on a sweeping scale. In the Southwest there seems to be, as in the configuration of the country, a general trend from north to south, but transverse movements have been as common in the vicissitudes of the same tribes as transverse upheavals of the surface, and often barriers of that nature have changed the fate of a group, compelling it to retrace its steps.——even to 'go back to the place of beginning.'" (pp. 31-32.)

" * * * Comparative permanence of abode was possible in the Southwest only where irrigation could be resorted to, * * *." (p. 33.)

[88]

APPENDIX 7.

Official Testimony of the Honorable John Collier, Commissioner of Indian Affairs, and Report of the Interior Department, Hearings before the Committee on Indian Affairs, United States Senate, 75th Congress, 1st Session, on S. 1651 and S. 1779.

S. 1793, passed by the 74th Congress, First Session, would have amended the act of May 18, 1928 (45 Stat. 602), to provide that compensation could be obtained in a Court of Claims for (a) Indian tribes and bands with whom treaties have been made but not ratified to the extent of $1.25 per acre for the lands they would have obtained under the treaties, plus value of other benefits under the treaties, minus enumerated offsets, and (b) for Indians with whom no treaties have been made for the acreage they had occupied, valued at $1.25 per acre less benefits. As respects (a), the act was, as the 1928 act had been, retroactive ratification of the treaties. As respects (b), the act was construable as retroactive recognition of some sort of possessory right, although proponents of the bill argued for it as much on the ground of ethical justice as on the ground of legal right.

The President's veto message, dated June 30, 1936, read in part as follows:

> "In addition to having the effect of imposing a very heavy financial burden on the Government, the bill would create a dangerous and undesirable precedent for similar endeavors on the part of the present descendants of other aborigines to secure payment for lands occupied by their ancestors at the time of the original settlements in the United States or the acquisition of territory by this country. Not only would such a course of action result in an

incalculable financial burden to the Government, but justice to the Indians of today does not seem to require this type of reparation." (Printed in Hearings before the Committee on Indian Affairs, United States Senate, Seventy-Fifth Congress, First Session, on S. 1651 and S. 1779, March 8, 9, 11, and 12, 1937, p. 3.)

The history of efforts in behalf of the California Indians and the reasons for the President's and Department of the Interior's objections to the vetoed measure, and the official viewpoint with respect to the bills pending in the seventy-fifth Congress, appears in the following testimony of the Hon. John Collier, Commissioner of Indian Affairs.

"Commissioner Collier. . . . This jurisdictional legislation for California goes away back to 1920. There has not been a year since 1920 that there has not been a bill pending. Finally, in 1928, a bill was enacted. That bill had been worked out by Commissioner Burke with considerable care. Commissioner Burke was a man who was well acquainted with Indian land law, and he drew a bill designed to get a specific result. The departmental report outlined what that result would be, and Congress passed the bill. [89]

"The point I am bringing out is one which I think is necessarily controlling on any legislation. It is this: California was a part of the Spanish territory. Under Spanish law Indians

acquired no legal right to land merely from the fact of occupancy. They acquired a legal title only if a grant was made to them.

"Senator Chavez (presiding). Like any other citizen?

"Commissioner Collier. Like any other citizen.

"In other words, Spain did not recognize the possessory right except as something which might be persuasive with the sovereign to make a grant, a consideration that might enter into the making of a grant. In other words, a possessory right had no legal existence; it was merely a factor in policy. That is very well known to Senator Chavez from his knowledge of the New Mexican law.

"In California the only grants made affecting Indians were grants made to the mission societies—to the Franciscan fathers or to the church—which grants were canceled out prior to American occupancy. So that at the time we took over California there were no property rights in the Indians. I am speaking, now, from the point of view of the Spanish law.

"Immediately after we took California over, steps were taken to create property rights in the Indians. That is, treaties were negotiated by executive officers of the Government and with Indians. I might remind you, Senator Chavez, that in New Mexico, at the same date treaties were being negotiated with the New

Mexico tribes by Calhoun. The treaties with the California Indians and with the New Mexican Indians came back here and the Senate did not validate either the California or New Mexico treaties.

"The Chairman. Were the treaties presented to the Senate for ratification?

"Commissioner Collier. Yes. They were debated extensively. There were opposing memorials adopted by the California Legislature. The proposed treaties would have given the Indians a little over 8,800,000 acres of land, including land with a great deal of gold in it. But the gold rush was on and there was not a chance in the world to get those treaties approved by the Senate, and they were not ratified. Therefore no contract was created and no property right or rights came into being through the proposed treaties.

"Under Spain title through mere occupancy could not arise. The question therefore, is, Did such a right arise after the United States took over the country?

"Senator Frazier. An agreement was made between the Indians and the representatives of the Government? [90]

"Commissioner Collier. Yes. It was a treaty. There were numerous treaties.

"Senator Frazier. All they lacked was ratification by the Senate?

"Commissioner Collier. Yes; just as a lot of other agreements have been made and not rati-

fied. I was referring to the incident that took place in New Mexico in the very same years and nearly the whole State was occupied and used by the Indians.

"Senator Chavez (presiding). What was the background of the Indian holdings in California during the Mexican regime?

"Commissioner Collier. There was no background except that some of the Indians had congregated under the missions.

"Senator Chavez. Was that under the Spanish regime?

"Commissioner Collier. The Mexican regime destroyed the church title.

"Senator Chavez. Altogether?

"Commissioner Collier. Yes; they revoked it, abolished it. An Indian did not hold title even under Spain; he was merely a ward of the church, and as such he had the use of land that had been granted to the church. In New Mexico it was different. Grants were made to tribes of Indians——

"Senator Chavez. Just for my own information, were not any of the treaties made in New Mexico ratified at all?

"Commissioner Collier. None of those treaties were ratified; only the Navajo treaty which came along later.

"Senator Chavez. That is the one I had reference to.

"Commissioner Collier. All of the other New Mexican tribes held their land either by Span-

ish grant or congressional or Executive order. There are no treaties in New Mexico except the Navajo treaty. The situation then was that the treaties having been rejected, the California Indians had no legal right that they could enforce." (Hearings, pp. 40-41.) [91]

"Commissioner Collier. * * * Last year a bill was passed by both Houses of Congress. The Budget was opposed to it. It later developed that the Department of Justice was energetically opposed to it. The Interior Department endorsed it. We endorsed it in spite of the fact that there were speculative elements in the bill and obscure phrases. We then went to the President to try to persuade him to sign it, and he presented us with not only the Budget argument and the Department of Justice argument which was made to him and which really could not be met, but pointed out that the bill as passed by Congress threw the case over into the Court of Claims for a decision by the Court of Claims as to whether the Indians had acquired title to the lands through possessory claims; that is, as to whether possession had created title. There has not yet been any case where the higher courts have held that possession created title.

"Therefore, we were on the horns of a dilemma. The Court of Claims might find no judgment at all, or they might find in excess of $50,000,000. The possibilities ran all the way from zero to some vast sum.

"The President was very definite that he did not want to have that kind of operation precipitated. Furthermore, it was evident that the precedent of treating the possessory right as a legal right for the Indian tribes was incalculable in its possible consequences; that it might let the Government in for sums of gigantic dimensions in behalf of other tribes.

"That is what the Department of Justice had argued. But the President was hospitable to the idea of doing something to determine the need of the California Indians and meeting that need generously. And it is along that line that I believe something might be put through and signed. We admit a moral obligation to do something. The moral claim of these Indians is simply an overwhelming one, even though it has no legal or equitable character." (Hearings, pp. 43-4.)

"The Chairman. What other States had treaties entered into and submitted to the Senate for ratification that were never ratified?

"Commissioner Collier. I cannot answer that, except that agreements were negotiated very generally. There was an agreement with the Navajo tribes. That was entered into with the Army. They were going to be given lands in return for helping to run down Geronimo and catching him. That was never validated.

But the Navajo Indians cling to that just as tenaciously as the California Indians cling to their unratified treaties. There must be scores of commitments entered into by negotiators which were not ratified. In other cases no commitments were entered into. In Alaska we just took everything. [92]

"You will recall that the Pueblo Indians came in with a great many evidences of possessory rights; and there was one big area where the Pueblos actually had had exclusive grazing benefits for many years, only it was not a grant, hence no property right had arisen.

"As for creating a new precedent, a precedent is already created by a gratuitous settlement of $6,000,000 just as much as it would by a gratuitous settlement of $20,000,000; but at least we might escape opposition from the Department of Justice. The Department of Justice, I believe, would oppose anything which translated a mere possessory right into a legal title, thereby laying a basis for illimitable suits." (Hearings, p. 46.)

On April 28, 1937, the Department of the Interior officially submitted to the Committee on Indian Affairs a review of the whole matter, setting forth the official attitude. This letter is reprinted in Senate Report No. 1041, 75th Cong., 1st Sess. (hearings, pp. 357-72, at 366). The report in part reads as follows:

"California was an area of relative density of Indian population. The Indians, numbering 200,000 or more, were peaceable. Their institutions were of primitive character, but their aboriginal land tenure presented an entirely definite picture. Hundreds of tribes and bands occupied territories whose boundaries were known to all and were acknowledged and respected by neighboring tribes and bands.

"Under Spanish sovereignty, title was conveyed to the Indians in portions of the Southwest, but not in those in the area which is now California. The Mission orders did receive titles to land, and these mission lands were populated by Indians under the missions.

"In 1834, under the Mexican Government, the missions were secularized and the lands were expropriated. The first major extermination of California Indians then took place. I quote from the report of C. E. Kelsey, special agent for the California Indians, dated March 21, 1906, which report is contained in the House hearings of March 23, 1920, page 123, dealing with the first jurisdictional bill for the California Indians (H. R. 12788):

" 'In the year before the secularization, 1834, the mission records showed some 34,000 converts in the mission strip. There were probably some unconverted Indians termed "gentiles." Only about [93] 3,000 descendants of these mission Indians are alive today. Most of the decrease is understood to have taken place be-

tween 1834 and 1849. A few of the Indians who had come from the San Joaquin Valley returned there. In southern California those who were able to return to the mountains thus saved themselves from extinction, but the great body of the mission Indians undoubtedly perished where they had lived. Most of them died during the Mexican period, and not under that of the United States.'" (Hearings, p. 366.) [94]

APPENDIX 8

Congressional Globe, March 1 and March 2, 1866, relating to the amendment of Section 2 of the Act of July 27, 1866, by adding the words "and only by their voluntary cession."

"Mr. Pomeroy. The last clause of the second section reads thus:

"The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the said Indians, the Indian title, &c.

"That is the first place in all the bill where the word 'Indians' is used, and the word 'said' should be stricken out." (p. 1101.)

"Mr. Land, of Kansas. At the request of the delegation from the Chickasaws and Cherokees, who reside in and own the greater portion of what is known as the Indian Territory, I call the attention of the Senate to one feature of this bill. The title of the Indian country is in five tribes, and we are under treaty obligations not to enter upon them without their consent. They are strenuously opposed, and pro-

test against selling any portion of their country for white settlement. This railroad will run through the entire length, I believe, of the Indian Territory. The second section of this bill contains the following provision:

"That the United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the said Indians, the Indian title to all lands falling under the operation of this act, and acquired in the donation to the road named in this bill.

"For them, and in their name, and in behalf of the Government, I desire to have that clause stricken out, a clause compelling the Government to extinguish the Indian title so far as the Indian Territory is concerned. We are under the most solemn treaty stipulations not in anywise to intrude upon them. The title to the land is in them, and they are strenuously opposing any sale of their land for white settlement. They have suggested, in the treaties they are now making, that if a railroad is to be made through that country, each tribe having a separate government, the sale of the lands by the Government or by the railroad company shall be to some member of their tribes and not to white men.

"It may be well for me to state that there is now pending before the Committee on Territories a bill for the organization of this Indian country, having in view the building up of an

Indian Territory, excluding all white men therefrom. This bill if it passes will destroy the theory of that bill, and will expose these Indian tribes to the same encroachments and the same fate that has overtaken them and other Indian tribes before. I have not the treaties with these tribes before me, but the President pro tempore of the Senate laid those treaties [95] before this body at the last session. They are of the most solemn character. We have agreed that there shall be no government extended over them without their consent; that there shall be no encroachments upon them; and now I submit to the Senator from Missouri as well as to other Senators whether it is expedient for the Government to bind themselves to extinguish the Indian title within that Territory, which will open up that country, as I have before remarked, to white settlement and drive off the Indians as they have heretofore been driven off.

"Mr. Brown. I do not know that there is anything in this bill that will bind the Government of the United States to take any action that would conflict with its treaty obligations. I do not suppose that there is. I do not suppose that we could bind the Government to do so. If there are any obligations of that sort, of course they will control the action of the Government, and this clause will not interfere with it. If there are not, I see no objection to the

clause. I do not participate in the view that the Senator seems to have, that that country should be kept exclusively for Indian tribes any further than we are obligated to do so now.

"Mr. Lane, of Kansas. What I have said has been at the request of the delegation of Chickasaw and Cherokee Indians who are now in the Marble Room.

"Mr. Brown. This is the same clause that has been put in all these railroad bills in regard to extinguishing Indian titles. It does not differ from them in any respect.

"Mr. Lane, of Kansas. We have heretofore agreed to extinguish a possessory title that the Indians have; but here is a legal title. The lands are patented to them. I now have the treaties before me. Every Senator on this floor is aware of those stipulations. They are of the most solemn character that we will not encroach upon them, that we will not intrude upon them without their consent; and yet this bill proposes to compel the United States to extinguish their title. To be sure there is a clause that it shall be extinguished 'as rapidly as may be consistent with public policy and the welfare of the said Indians;' but if this bill passes we agree to extinguish that Indian title, which is an agreement on our part to destroy and trample under foot the most solemn treaty stipulations that we have with these Indian tribes.

"Mr. Brown. On the contrary, the language of the clause expressly prohibits that thing. It says that the Indian title is to be extinguished as far as is consistent with the policy of the Government.

"Mr. Lane, of Kansas. 'The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the said Indians, the Indian title to all lands falling under the operation of this act, and acquired in the donation to the road named in the bill.' It seems to me that that is just the same as if the Government were to agree to extinguish the title to my land or to your [96] land. We have never engaged to do any such thing heretofore. We have agreed to extinguish a possessory title, but not where the title is in fee as in this case.

"Mr. Grimes. I should like to be informed whether or not this road is to run through the Cherokee, Choctaw, and Chickasaw lands?

"Mr. Lane, of Kansas. Their entire lands.

"Mr. Grimes. By the provisions of this bill, if it should be enacted into a law, will this company acquire a title to land belonging to these Indians?

"Mr. Lane, of Kansas. They acquire alternate sections, just as has been granted heretofore in these bills.

"Mr. Pomeroy. Oh, no, not the alternate sections; nothing but the right of way, under this bill.

"Mr. Lane, of Kansas. The third section of the bill provides:

"'That there be, and hereby is, granted to the (Southern) Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt.'

"Then there is the other clause that I have read making it——

"Mr. Brown. The Senator understands that that does not refer to Indian land, the title to which is not in the United States.

"Mr. Lane, of Kansas. But here is a clause at the end of the second section that compels the Government to extinguish the Indian title along the line of this road.

"Mr. Grimes. Then I understand that the idea of the Senator from Kansas is, that when the Government shall extinguish these title, that title is to inure to the benefit of this company.

"Mr. Lane, of Kansas. Certainly; and it is peremptory on the Government to extinguish

the Indian titles just as was provided in the bills that were passed for railroads in the State of Iowa.

"If the Senator from Missouri desires these treaties to be read again, (as they have been read in the Senate,) I have them here and can read them. I repeat, they are of the most solemn, peremptory, and emphatic character, that we will not intrude upon nor encroach upon these Indians. I am as anxious [97] to have this road as the Senator from Missouri; but I suggest to him whether, inasmuch as we are trying to get up a government for these Indians, in order that everything may be consistent, it would not be as well to refer this bill to the Committee on Territories, which now has before them a bill for the organization of a territorial government for these Indians, so that the two bills may be made to harmonize. The Indians would have no objection to this railroad, provided the grant is made through their governments.

"I desire to say to the Senator from Iowa and to the other Senators that the Chickasaw government (and a delegation of them are now in the city) has already granted a charter for a railroad company through their nation. They claim the same jurisdiction over their territory that Missouri or Iowa does over its territory. The question, I submit, in their name and for them is, that we ought not to compel the Gov-

ernment to extinguish the title in their country if the title when extinguished is to go into the hands of white settlers.

"Mr. Brown. I suggest to the Senator if that is his object, I do not think the clause bears the construction which he puts upon it. He may strike out the word 'welfare,' and insert the word 'assent.'

"Mr. Lane, of Kansas. I will suggest to the Senator from Missouri that what these Indian tribes desire is, that they may make the grant. The Chickasaw tribe of Indians, in making their grant, reserved a bonus to their nation. What they want of your company is, that instead of obtaining the grant of land through the General Government, they should get it through them, giving them a bonus. The Chickasaw Indians reserved a bonus of two per cent. of the net profits of the road to which they made a grant. They want to go forward and aid this road, and you will have no trouble in getting your land grant from them.

"Mr. Sherman. As it is probable that we can hardly pass this bill before the morning hour expires, I should like to take up a bill to which I am sure there will be no objection.

"Mr. Brown. There is nothing to prevent the passage of this bill now if this matter is passed upon.

"Mr. Sherman. If there is to be no further debate upon it, I shall not object; but I should

like to have the bill to which I refer passed before the regular order of the day comes up.

"Mr. Brown. I will move to insert in the seventeenth line of the second section, after the word 'Indians,' the words 'and only by their consent;' so that the clause will read: [98]

> "'The United States will extinguish, as rapidly as may be consistent with public policy and the welfare of the said Indians, and only by their consent, the Indian title to all lands falling under the operation of this act and acquired in the donation to the road named in the bill.'

"Mr. Pomeroy. I do not think it necessary to make that amendment. It will not do any good. You cannot extinguish the Indian title except by their consent.

"Mr. Brown. I know that; but it brings it within the objection that the Senator's colleague has taken.

"Mr. Lane, of Kansas. While that may be true, you may bind the Government to do it.

"Mr. Pomeroy. This does not bind the Government to do it.

"Mr. Lane, of Kansas. Yes, sir. I so understand it.

"Mr. Brown. I do not so understand it.

"Mr. Johnson. I suggest to my friend from Missouri that perhaps he had better let this subject go over until to-morrow. If there is any doubt whether, as the bill now stands, it would

interfere with the treaties, we ought to solve that doubt very positively before proceeding further.

"Mr. Brown. I do not see how there can be any possible doubt, when the language of the bill leaves it subject to the action of the Government in the future exclusively.

"Mr. Johnson. I do not say that there is any well-founded doubt: but I understand that the Senator from Kansas has a doubt on that subject.

"Mr. Brown. I believe this amendment removes even his doubts.

"Mr. Johnson. He says not; and certainly no member of the Senate is disposed to interfere with the obligation of treaties. I am satisfied the Senator from Missouri is the last member who would do it.

"Mr. Brown. I am willing to let the bill go over until to-morrow, and we can take it up then and dispose of it.

"The President pro tempore. By common consent the bill will be considered as postponed until to-morrow." [99]

On March 2, 1866 (Congressional Globe, p. 1132), the following occurred in the Senate:

"Mr. Brown. I move that we now resume the consideration of Senate bill No. 20.

"The motion was agreed to; and the Senate, as in Committee of the Whole, resumed the consideration of the bill (S. No. 20) granting lands

to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast, by the southern route, the pending question being an amendment of Mr. Brown to insert in the second section after the word 'Indians,' in line seventeen, the words 'and only by their consent.'

"Mr. Brown. I modify the amendment so as to say 'and only by their voluntary cession.' That is the language of the treaties, and I prefer to use the same language.

"The President pro tempore. The Senator has the right to modify his own amendment.

"Mr. Lane, of Kansas. Let the clause be read as it will stand if thus amended.

"The Secretary. If the clause be amended as proposed, it will read as follows:

> "The United States shall extinguish as rapidly as may be consistent with public policy and the welfare of the said Indians, and only by their voluntary cession, the Indian title to all lands falling under the operation of this act.

"Mr. Lane, of Kansas. I ask the Senator if that includes the right of way.

"Mr. Brown. Yes, sir; it includes everything.

"The amendment was agreed to.

"The bill was reported to the Senate as amended, and the amendments were concurred in.

"The bill was ordered to be engrossed for a third reading, was read the third time, and passed.

"On motion of Mr. Brown, its title was amended by striking out the words 'by the southern route.'" [100]

APPENDIX 9.

Congressional Record, March 28, 1918, 4194 et seq. Origin and Reasons for Act of 1918, 40 Stat. 570, Title 25, Sec. 211 U.S.C.

"Mr. Smith of Arizona. I offer the amendment which I send to the desk.

"The Presiding Officer. The amendment proposed by the Senator from Arizona will be stated.

"The Secretary. On page 25, line 13, it is proposed to add the following:

"That hereafter no Indian reservation shall be created nor shall any additions be made to one heretofore created within the limits of the States of New Mexico and Arizona, except by act of Congress.

"Mr. Smith of Arizona. Mr. President, I wish to detain the Senate but one minute about this amendment. States other than the States of New Mexico and Arizona have been protected as proposed by the amendment. Only last year there was created an enormous Indian reserva-

tion, for which there was no earthly need, in the county in which I live. It is now threatened by Executive order to enlarge other reserves affecting both New Mexico and Arizona. Notwithstanding, as I am informed, the Indians now have something like 10,000 acres of land apiece for every member of the tribe, this policy has been pursued to a point which makes us feel that when we make an appropriation from the Treasury we must have the guarantee of an act of Congress to make it good. There is no limitation on the power of the Commissioner of Indian Affairs to recommend the extension to any distance or for any length of these Indian reservations in our State for the enlargement of which there is no earthly necessity.

"Anyone who will look at conditions in that State and at the map will know, I think, before any more public land is taken away from the people who have got to meet conditions subsequent to this war, when the Indians are so amply provided for, that it would be an outrage on the people not only of that State, but upon all who are interested in the public lands of the United States.

"In connection with this matter I have prepared an exhibit, and I have had my secretary make it a little bigger, showing the areas which are devoted to Indian and forest reservations. There (indicating) are the Indian reserves

which have already been made in my State, which are shown in red; the green indicates the forest reserves, and the white indicates the desert and mountain lands; all that is left. There has been taken from that State nearly half of the best land in the State. It has been dedicated to the balance of the United States in the shape of forest reserves. The department has given the land which is indicated on this map by red to the Indians, when there are 20 white men to one Indian in the State. That land (indicating) is all that is left to the State of Arizona with which to pay taxes to support its government. Then it is sought on behalf of the [101] Commissioner of Indian Affairs to run across the line into New Mexico. Senators will observe from the map that in connection with the Navajo Reservation the yellow area goes clear into the adjoining State of New Mexico. To make these enlargements either in Arizona or New Mexico is contrary to all common sense and reason.

* * * * * * *

"Mr. Smith of Arizona. The amendment provides that no other Indian reservation shall be created or that no Indian reservation now in existence shall be enlarged without being authorized by an act of Congress. That is all. It is proposed to retain what Congress ought always to have kept—the right of disposition of the public lands.

"Mr. Ashurst. Mr. President, I hope the amendment which has been proposed by my colleague will be adopted. I speak with familiarity as to the Indian reservations in Arizona and New Mexico. The reservations in those two States are large enough now, and even as I speak I have before me a letter from the Bureau of Indian Affairs, in which I am advised that the Interior Department has under consideration the question of making a large addition to a certain reservation in New Mexico and Arizona.

"There was a tribe of Indians in Arizona, to wit, the Papagoes, which the Arizona delegation in Congress felt ought to have some small additions made to their reservation to take care of the watering places used by those Indians; indeed, we went so far in 1916 as to ask the department to set aside a proper area as an addition to their reservation, but when the Executive order came down we found to our amazement that instead of a few thousand acres being set aside, over 2,000,000 acres were set aside and it required months for us to correct the error.

"Mr. Jones of Washington. Mr. President——

"The Presiding Officer. Does the Senator from Arizona yield to the Senator from Washington?

"Mr. Ashurst. I do.

"Mr. Jones of Washington. Does not the Senator from Arizona think that under the circumstances it would be wise to insert a provision in this amendment to the effect that any reserve created by Executive order shall be considered unlawfully created after this date, or something like that, to prevent the establishment of a reserve by Executive order before this bill goes into effect?

"Mr. Ashurst. I think that is a very wise plan, and I hope my colleague will give his attention to it.

"Mr. Jones of Washington. It will be done, if they contemplate doing it, before this bill goes into effect. I suggest whether it would not be possible to insert a provision in this bill to make unlawful the creation of such reservations after this date? I merely make the suggestion, though I do not think the department will do anything contrary to the spirit of the amendment proposed. As will be remembered, however, as the [102] Senator suggests, when some years ago a bill was passed here declaring that no further reservations should be made in certain States, the President, before the bill became a law, made reservations as big as he pleased, and then signed the bill.

* * * * * * *

"Mr. President, in my opinion, Arizona has too many Indian reservations. The creation of a reserve deprives a State of the right to tax the land within its borders and is an interference with the rights of the State. It is an outrage that millions of acres of land in a sovereign State of this Union should be set aside and forever held without the right of taxation by the State. That never was in contemplation by the framers of the Constitution, because the National Government, if it should carry that principle to the extreme, would have the power to almost annihilate a State by withdrawing great portions of the land of the State from taxation.

"Mr. President, it seems to me if there is no provision of law prohibiting the setting aside of Indian reservations that we ought to adopt such a provision now and have it in force as quickly as possible, so that the rights of the States may be protected against the encroachments of the Federal Government in that respect.

"The Presiding Officer. The question is on agreeing to the amendment offered by the Senator from Arizona (Mr. Smith).

"The amendment was agreed to." [103]

APPENDIX 9 (a)

Extracts from Senate Report 609, 61st Cong., 2nd session, Survey of Public Lands within the Limits of Land Grants, etc., pp. 2 and 3, relating to the bill which became the act of 1910, 36 Stat. 834. Unsurveyed lands within railroad limits.

	Acres.
Atlantic and Pacific, now Santa Fe Pacific	5,406,584

The following table gives the area of unsurveyed railroad lands by States:

Arizona	5,044,740

"It is deemed wise and important that these lands be surveyed as promptly as possible for various reasons—first, that they may become taxable by the States and communities; second, that the Government may dispose of its lands which join the railroad lands, and in order that where the railroad lands occur within forest reserves—about 3,000,000 acres—of the unsurveyed lands being in reserves—the government officials may be able to determine the boundaries of the public lands for the purpose of regulating and controlling the same, selling the timber, etc.

"There is appended hereto and made a part of this report two letters from the Interior Department in regard to the proposed legislation."

Department of the Interior,
Washington, February 10, 1910.

Hon. F. W. Mondell,
Chairman Committee on the Public Lands,
House of Representatives.

My dear Mr. Mondell:

As requested by the Committee on the Public Lands, I have the honor to transmit herewith table showing the dates of the various granting and other acts relating to the Northern Pacific, Southern Pacific, Central Pacific, California and Oregon, Union Pacific, and Atlantic and Pacific railroads, together with a statement of the areas of the grants, the unsurveyed lands within the grant limits, and the unsurveyed lands within the grants lying within national forests. [104]

I have had the railroad division of the General Land Office, which is charged with the adjustment of these grants, examine the acts in question and attach their memorandum to the effect that there is nothing in any of the grants which will prevent such lands from being taxed under the provisions of the act of July 10, 1886 (24 Stat., 143), upon their being surveyed. The cases of Central Pacific v. Nevada (162 U. S. 512) and Northern Pacific v. Myers (172 U. S. 589) are cited in this connection.

The act of July 2, 1864, granting lands to the Union Pacific, Central Pacific, and Western

Pacific railroads, section 21 (13 Stat., 356-365), expressly requires that before any land granted is conveyed to any of said companies, they must first pay the cost of surveying, selecting, and conveying the lands. It would appear, therefore, that so far as these grants are concerned, payment for surveying being a condition of the grant, a failure to comply with that condition would warrant the declaration of a forfeiture in the event of the refusal to comply with that condition.

The other grants do not appear to have contained this language; but the sundry civil act of July 15, 1870 (16 Stat., 305-306), made the same requirement of the Northern Pacific Railroad, and the act of July 31, 1876 (19 Stat., 102-121), makes the same requirement as to all railroad companies to which lands had been granted, except to those companies exempted by law from such payments. As above stated, none of the companies here involved were so exempt.

There may be a question as to the right to declare a forfeiture against the companies upon which no such condition was imposed in the original grant; but attention is directed to the fact that Congress has subsequently imposed the condition as a prerequisite to conveyance of title, and its right so to do has, so far as I can learn, never been successfully questioned. Surely the Government of the United States

is not powerless to cause, through appropriate judicial proceedings, the restoration of the granted lands to the public domain if the companies shall refuse to comply with the conditions imposed by Congress. As to the effect of the provisions of law requiring companies to make payments for surveying, etc., I direct attention to the cases of Railway Co. v. Prescott (16 Wall., 803), Railway Co. v. McShane (22 Wall., 444), and the Northern Pacific Railroad Co. v. Traill County (115 U. S., 600), [105] the latter case containing an expression which indicates that Congress has the power to declare forfeiture——

> "The remedy lies with Congress and is of easy application. If that body will take steps to enforce its lien for these costs of survey by sale of the lands or by forfeiture of title, the Treasury of the United States would soon be reimbursed * * *"

It has been suggested that the period of thirty days allowed the companies in section 2 of the bill to deposit the moneys for surveying is too short; also that some provision should be made, probably in section 1 of the bill, for the return of any excess of deposits which may remain after all surveys have been made and the grants adjusted. The Secretary authorizes me to say that he has no objection to amendments of the bill in these particulars.

The General Land Office is preparing the statement asked for, showing the area of unsurveyed railroad lands in each national forest, but informs me that it will take a week or more to compile the data.

Very respectfully,

E. C. FINNEY,

Assistant to the Secretary.

[106]

APPENDIX 10

Congressional Globe March 2, 1865, p. . Poston's account of the setting aside of the Walapai Reservation.

"* * * I called the confederated tribes of the Colorado in council together. The council was attended by the principal chiefs and head men of the Yumas, Mohaves, Yapapias, Hualapais, and Chemihuevis. These tribes have an aggregate of ten thousand souls living near the banks of the Colorado, from Fort Yuma to Fort Mojave.

* * * * * * *

"But as the representative of the Government of the United States at that time, I did not undertake to make a written treaty with these Indians, because I considered that the Government was able and willing to treat them fairly and honestly without entering into the form of

a written treaty, which has been heretofore so severely criticised in both Houses of Congress, and with some reason. These Indians there assembled were willing, for a small amount of beef and flour, to have signed any treaty which it had been my pleasure to write. I simply proposed to them that for all the one hundred and twenty thousand square miles, full of mines and rich enough to pay the public debt of the United States, they should abandon that territory and confine themselves to the elbow in the Colorado river, not more than seventy-five thousand acres. But I did not enter into any obligation on account of the United States to furnish them with seeds and agricultural implements. I simply told them that if I was elected to represent that Territory in this Congress I would endeavor to lay their claims before the Government, which they understood to be magnanimous, and that I hoped that this Congress would have the generosity and the justice to provide for these Indians, who have been robbed of their lands and their means of subsistence, and that they may be allowed to live there where they have always made their homes. They desire to live as do the Pueblo Indians of New Mexico and Arizona. These Pueblo Indians live in settlements, in towns, in reservations, according to the wise policy of the Spanish Government, which colonized the Indians in reservations and made their labor valuable in

building improvements for their own sustenance, for churches, and public improvements, and in that manner made them peaceable Indians, instead of having everlasting and eternal war with the people whom they had robbed of their land.

"These people having been citizens of the Mexican Government, are not, according to our theory, entitled to any right in the soil; and therefore no treaty with these Indians for the extinction of their title to the soil would be recognized by this Government. It is a fiction of law which these Indians, in their ignorance, are not able to understand." [107]

[Endorsed]: Motion to Dismiss and Memorandum of Authorities. Filed Mar. 31, 1938. [108]

[EXCERPTS FROM BRIEF OF DEFENDANT SANTA FE PACIFIC RAILROAD COMPANY IN SUPPORT OF ITS MOTION TO DISMISS THE COMPLAINT.]

PART I

THE WALAPAI HAVE NEVER BEEN ACCORDED ANY POSSESSORY RIGHT IN THE LANDS INVOLVED UNDER THE POLICY AND LAWS OF THE UNITED STATES

* * * * * * *

B. The Walapai Were Disunited Bands of Non-agricultural, Nomadic Savages Who Occupied Exclusively No Definable Territory and No Place or Places for Any Great Length of Time

The Walapai made their debut in white history in Father Garces' Diary. He found them in 1776 near the site of Kingman, eating food and wearing clothes characteristic of wild nomads; but other Indians, not Walapai, were to the East. Another group of Indians, called Yabipai (W. P.,* 4-6), was found where the 1883 reservation was subsequently located. (Ibid., 6-11.) Garces later reports that from Diamond Creek, on the subsequently established reservation, to the Black Mountains, a stretch

*The letters W. P. are used herein as an abbreviated reference to Walapai Papers, Senate Document 273, 74th Congress, 2nd Session.

of country in the northwest portion of that here in issue, Yabipai-Cuercomaches were found (see Appendix 1, Points and Authorities). Pedro Font, who drew a map in 1777 and was an intimate of Garces, showed Yavapai north of Walapai (see Appendix 2, Points and Authorities). The Eighteenth Annual Report of the Bureau of Ethnology places Walapai where Font placed some, at least, of the Yavapai (see Appendix 3, Points and Authorities). The American Bureau showed that Walapai inhabited lands south and west of the 1883 reservation, but were on the lands that became the reservation very slightly, if at all.

Seviches, Yavapai, and Apaches were all over the territory here at issue in historic times, as indicated by sources mentioned in the Points and Authorities. Lieutenant Wheeler reported that Walapai were wild and roving, and that their life had carried them "beyond the notion of anything like order even among their own people." Major Price stated they had no tribal cohesion, appearing in independent bands in their hostility to the settlers.

The Walapai were, in short, disunited bands of non-agricultural, nomadic savages who occupied exclusively no definable territory and no place or places for any great length of time. They were wanderers in a land of other wanderers with whom, as between various Walapai bands, there was competition for food and water which accentuated, for

the competitively unsuccessful at least, the necessity, already imposed by a barren country, of continuous and far-flung searchings for the necessities of life. They were thus true to the shifting pattern found generally prevalent in the Southwest by Mr. Bandelier in his studies carried on from 1880 to 1885 (see Appendix 6, Points and Authorities).

* * * * * * *

D. No Soil Right Was Recognized in the Walapai.

These lands came from Mexico in 1848 by the treaty of Guadalupe Hidalgo (9 Stat. 922). By Article IX, Mexicans remaining in the ceded territory were to be admitted to United States citizenship, and to be "maintained and protected in the free enjoyment of their liberty and property." Article XI reads in part as follows:

> "Considering that a great part of the territories which, by the present treaty, are to be comprehended for the future within the limits of the United States, is now occupied by savage tribes, who will hereafter be under the exclusive control of the government of the United States, and whose incursions within the territory of Mexico would be prejudicial in the extreme, it is solemnly agreed that all such incursions shall be forcibly restrained by the government of the United States whensoever this may be necessary; and that when they cannot be prevented, they shall be punished by the said government, and satisfaction for the same shall

> be exacted—all in the same way, and with equal diligence and energy, as if the same incursions were meditated or committed within its own territory, against its own citizens." (p. 930.)

The Walapai, or the bands of Walapai, were of the savage tribes referred to in Article XI. They enjoyed no Mexican grants such as were held by the Pueblos of New Mexico. The contrast between Article XI, indubitably including Walapai among the savages to be controlled and, if need be, removed, and the references of Article IX to the status of Mexican citizens and the protection of their property rights, is persuasive that the Walapai were not referred to in Article IX. They were not affected by it in property right, or by the principle of our law which protects private rights in acquired territory, because they enjoyed no property right whatsoever under either Spain or Mexico.

The applicable laws of Spain and Mexico are known to the Court as a part of our domestic law. Their detail was so fully set up by the United States in its brief in Pueblo of Santa Rosa vs. Fall, No. 4298, in the Court of Appeals of the District of Columbia, involving the Papagoes, that defendant adopts such presentation as its own, and attaches the appropriate excerpts hereto as its Exhibit I. The conclusion of the detailed presentation is the same conclusion repeatedly stressed in the reports transmitted by the President to the Congress, and

in other official reports and documents, and crystallized in a long course of legislative and administrative actions: in the territory ceded by Mexico, Indians without formal Spanish or Mexican grants were without soil right which the United States was required to, or should, respect.

One of the first reports was that of William Carey Jones in the early 50's, on California titles. Spanish and Mexican titles were held only by formal grants; "In the wild or wandering tribes the Spanish law does not recognize any title whatsoever." A large number of treaties negotiated with California Indian tribes, whose areas of exclusive factual dominion were well marked, were refused ratification because the Indians had no legal right under Spain and Mexico, and because the United States acquired the soil free of Indian right. The reason for this action was reiterated as public policy year after year in the reports transmitted to Congress by the President (See Points and Authorities, pp. 7-9). It was the principle motivating legislation and administration. In the words of the Bureau of American Ethnology, the United States assumed title to all lands from the Rio Grande to the Colorado. The same obvious conclusion is drawn in IV Kappler, Indian Affairs, Laws and Treaties, Senate Document 53, 70th Cong. (1929), 1170-71. The present Commissioner of Indian Affairs, the Department of Justice, and the President have continued this policy and declined to establish any

precedent which would undo it or destroy its results (Appendix 7, Points and Authorities).

In Hayt v. United States and the Utah Indians, 38 Ct. Cl. 455, the Court of Claims says:

> "But as for Mexico, neither the researches of counsel nor the investigations of the court disclose recognition of aboriginal title by that Government. When the independence of Mexico was established in 1821 the revolutionary government adopted a decree known as the 'Plan of Iguala.' This plan was reaffirmed by the treaty of Cordova and its principles were adopted by the Mexican Congress under enactments in 1822 and 1823. By this plan it was declared that 'All the inhabitants of New Spain, without distinction, whether Europeans, Africans, or Indians, are citizens of this Monarchy, with a right to be employed in any post, according to their merit and virtues.' Under these declarations the civilized Indians of Mexico have enjoyed political rights. And it is interesting to note in this connection that Juarez, who came to the presidency of the Mexican Republic, was a full-blooded Indian. So far as the wild tribes are concerned they do not seem to have had reservations set apart to them, but they remained in Mexico without molestation because no doubt they were too numerous to be expelled and yet too uncivilized to be incorporated in the body politic.

"No account seems to have been taken of them in the settlement schemes of Mexico. By the first colonization law there it was provided 'that the lands of the Government which are not the property of any individual, corporation, or town are the subject of the law and may be colonized.' (Sec. 27, Law of 1824, Rockwell's Span. and Mex. Law, 451; United States v. Ballejos, 1 Black, 541.) In Chihuahua, where the Apaches, Ute and Navajo Indians resided, colonization was provided for a large portion, if not all, of what now comprises New Mexico and Colorado. This was in 1825, and no reference was then made to Indian titles. (Reynolds's Span. and Mex. Laws, 132.) So, in the colonization scheme provided by Sonora, it appears that 'there are colonizable in the State all the desert and vacant lands on its frontiers which belong to it and are not the property of an individual, corporation, or town." (Ibid., 296.)

"The Supreme Court of the United States has taken judicial notice of the status of the civilized Indians in New Mexico. (United States v. Ritchie, 17 How., 156; United States v. Joseph, supra.) But the status of the uncivilized tribes was not considered in those cases.

"The right to remove Indians from any portion of the ceded territory was recognized by

the twelfth article of the treaty of Guadalupe Hidalgo. (9 Stat. L., 930.) By a treaty made between the United States and the Navajos those Indians came under the exclusive jurisdiction and protection of the United States, and the laws regulating trade and intercourse with the United States were extended over the Navajo country. A similar treaty with the Utahs was likewise proclaimed September 9, 1850. (9 Stat. L., 984.) By its fourth article the territory occupied by the Utahs was annexed to New Mexico and the trade and intercourse laws extended over them. Free passage through territory occupied by them was provided for, and there was a stipulation to the effect that the United States should at their earliest convenience designate, settle, and adjust the territorial boundaries of the tribe; but in the meantime, by article 7, the tribe was not permitted to depart from their 'accustomed homes' unless specifically permitted, and the Utahs agreed to confine themselves strictly to such limits as might thereafter be assigned to them by the United States. There was neither recognition of title in the soil nor was there denial of any such claim, if any existed. Apparently the promise to fix boundaries was left open to be claimed as a right by the one party or to be fixed as a matter of grace by the other.

"By the treaty of October 7, 1863 (13 Stat. L., 673) with the Tabeguache band of Indians—the same who committed this depredation—a definite claim was asserted, as appears from the preamble, to wit:

> "'Whereas the Tabeguache band of Utah Indians claim an exclusive right to the following described country as their lands and hunting grounds within the territory of the United States of America, being bounded and described as follows, to wit: Beginning on the thirty-seventh degree of north latitude,' etc.

"But the Senate of the United States inserted an amendment after the word 'claim,' so as to make the same read, 'As against all other Indian tribes.' Another amendment provided that nothing contained in the treaty should be construed or taken to admit on the part of the United States any other or greater title or interest in the lands excepted and reserved in said tribe or band of Indians than existed in them on the acquisition of said territory from Mexico by the laws thereof

"Under an act entitled 'An act to vacate and sell the present Indian reservations in Utah Territory and to settle the Indians of said Territory in the Uinta Valley,' approved May 5, 1864 (13 Stat. L., 63), Congress re-

quired the special reservations theretofore made or occupied as such in Utah, excepting Uinta Valley, to be surveyed into tracts so that all or as many of the Indians there as practicable should be removed to the valley, which by the act was set apart for the permanent settlement of such of the different tribes of Utah as might be induced to occupy the same. The act of February 23, 1865 (13 Stat. L., 432), relates to the lands described in the act of 1864 as far as we are able to determine.

"The lands mentioned in the act of May 5, 1864, were restored to the public domain by a subsequent act approved June 18, 1878. (20 Stat. L., 165.)

"By the treaty of 1868 the United States fixed the boundaries of the country of the other Utahs. By this treaty seven bands relinquished all claims and rights in and to any portion of the United States not embraced in reservations defined by the treaty. (15 Stat. L., 620.)

"Considering that by the first treaty with the Tabeguache band rights of occupancy were left indeterminate, that by the next agreement the treaty-ratifying power declined to recognize the Utahs as possessing any primary title, but expressly refused to admit any other or greater title or interest in the lands excepted and reserved to the tribe than existed in them on the acquisition of the country from Mexico by

the laws thereof, it does not sufficiently appear that the depredating tribe was occupying country to which they had a possessory right and title at the time of this depredation. The rule fixed by the political department of the Government in such a matter must be the rule to be followed by the judicial department. There was no special country set apart for the use of the Utahs before the treaty of 1863, and that treaty must be viewed as giving the band a country—limited by reservation boundaries—never before possessed by this band. It became Indian country when the United States set apart a reservation, and not until then, and to the extent of the reservations assigned to them only. The court must conform its will to that of the parties. If they did not stipulate for boundaries and an Indian country within limits at the outset, it is not the province of the court to define the limits of such a country now.

"No definition of Ute country appears prior to this treaty of 1863. The lands then assigned did not extend south of the thirty-seventh degree of north latitude, which was the southern boundary of Colorado. Title then, as it already appears, to lands north of that parallel was recognized in favor of that aboriginal band 'as against all other Indian tribes,' but not admitted as against the United States. None of the tribes acquired with the cession of territory

under the treaty of Guadalupe Hidalgo have ever been called upon to surrender any part of the country inhabited by them except the Tabeguache band. All but this band were removed at the pleasure of the Government. Nothing is disclosed by the record to establish any higher or greater title in this inconsiderable band than existed in the other Utahs, the various tribes of Apaches, and the Navajos.

"We are constrained to hold that with the acquisition of territory from Mexico the treaty-making power intended to Americanize the ceded territory and that the doors were not opened by the political department of the Government for Indians to commit depredations on the people who were there or upon those who might go there. The only rational view to take of the matter is that that country became Indian country only where the Indians had the exclusive right of occupancy. The defendant Indians did not have that right at the time of the commission of this depredation. Plaintiff's intestate was lawfully there."

Attention is called to the fact that the amendment to the Ute treaty occurred just prior to the statutory creation of a reservation for the Walapai, well beyond any lands in this litigation, and just prior to defendant's grant. The Hayt decision, and the history it relates, is conclusive confirmation of the whole tenor of public policy from 1848 to 1938;

Indians, including Walapai, had no rights unless from Mexican grants or United States reservations, in the territory acquired in 1848.

* * * * * *

APPENDIX

In the Court of Appeals
District of Columbia
No. 4298

THE PUEBLO OF SANTA ROSA,

Appellant,

vs.

ALBERT B. FALL, Secretary of the Interior, and WILLIAM SPRY, Commissioner of the General Land Office,

Appellees.

EXCERPTS FROM "BRIEF OF APPELLEES"

pp. 120-122

It should be noticed, however, that in many cases arising prior to 1853, Mexican grants had *uniformly been disallowed* by the Supreme Court if it did not appear that they had been

> "deposited and recorded in the proper public office among the public archives of the Republic".
>
> Berreysea v. U. S. 154 U. S. 623.

Citing:

U. S. v. Cambuston, 20 How. 59, 64.
U. S. v. Castro, 24 How. 346, 349.
U. S. v. Knight, 1 Black. 227, 251.
Peralta v. U. S. 3 Wall. 437, 440.

Speaking of a Mexican grant, the court also says:

"Where the petition and the other requirements following it have not been registered in the proper office with the grant itself, a presumption arises *against its genuineness, making it a proper subject of inquiry before that fact can be admitted. It is not to be taken as a matter of course; nor should slight testimony be allowed to remove the presumption.*"

Fuentes v. U. S. 22 How. 443, 454.

In the Castro case, supra (p. 349), it is said:

"The grants of portions of the public domain in Mexico, the mode of obtaining them, and the officers by whom they were to be issued, and the conditions to be annexed to them, were with *great precision regulated by law.* * * * It is sufficient to say that it was required to be in writing, the officers and tribunals before which it was to pass designated and every step in the process from the petition of the party to the final consummation of the title was not only required to be in writing, but also to be deposited and recorded in the proper public office among the public archives of the Republic."

On page 350 the same case says that, to maintain a title by secondary evidence, the claimant must show, (1) that the grant was legally made and recorded; (2) that the record has been lost or destroyed, and

> (3) "He must support this proof by showing that within a reasonable time after the grant was made there was a judicial survey of the land and actual possession by him by acts of ownership exercised over it."

After stating that without a survey and possession the authenticity of the grant would have nothing to support it but parol testimony, the court continues:

> "We find nothing in the history of *Mexican jurisprudence* or Mexican grants which would justify this Court in supporting a Mexican title made out by such testimony only, *or by secondary evidence* of any kind short of that above stated."

In the Peralta case, supra, the court says (p. 440):

> "The Mexican nation *attached a great deal of form* to the disposition of its lands and required many things to be done before the proceedings could ripen into a grant. But the important fact to be noticed is that *a record was required to be kept of whatever was done.* This record was a guard against fraud and imposi-

tion, and enabled the government to ascertain with accuracy *what portions of the public lands had been alienated. The record was the grant and without it the title was not divested.*"

(It will be noticed that all the above, to which much more might be added from other decisions, is exactly in line with our contention that plaintiff has neither legal existence nor title unless recognized as a pueblo by Spain or Mexico, with record evidence of such recognition, followed by the designation and marking out on the ground of the land given it as such pueblo. This matter will be taken up and supported by Supreme Court decisions later.) The entire drift of Supreme Court opinions is that, even under the treaty of 1848, with its exceedingly wide recognition of pre-existing titles of the loosest sort, regard must be had to the well-known insistence upon form characteristic of the Spanish and Mexican governments, and that loose pretensions to large and indefinite areas of land should not be sustained without archive evidence, as well as exact proof of possession and survey. Since this was true prior to the Gadsden Treaty, a stricter rule was necessarily enforced thereafter, and courts are precluded from recognizing pretended titles which have neither been "located" by definite demarcation on the ground, nor recorded in the archives by at least a minute, showing the recognition of plaintiff as a community.

pp. 125-145

Under the laws of Spain and Mexico, plaintiff could not be a legal entity capable of owning land without recognition as such by the government. No such recognition is shown.

The Spanish and Mexican theory of land tenure and of Indian rights thereunder is, in barest outline, as follows:

Upon the conquest, the lands of Mexico, whether occupied by Indians or not, became the individual property of the King of Spain, partly by virtue of the Papal Bull, and still more by right of discovery and seizure. It followed that no private land title could thereafter exist unless it emanated from the Crown. This, of course, required some affirmative act of recognition by the King or his delegates. The sale of these Crown lands constituted a valuable source of revenue; they were, therefore, a treasury asset, and for that, as well as other reasons, were imprescriptible. The original Indian inhabitants were treated not only as persons non sui juris, but as inferior beings. They were parceled out among the Spaniards to perform forced labor for their masters (encomiendas). They were removed from their original homes and concentrated in villages (reducciones) at the royal pleasure for convenience in governing and Christianizing them, and were subject to all sorts of restrictions not applied to Spaniards. (It is noteworthy that the Visitador-General of Spain twice recommended that the Papa-

gos themselves should be transplanted from their original homes to other places; Tr. p. 223.) Some of these disabilities were later modified but "the disposition first announced, that of direct vassalage, remained a fixed dogma of Spanish-American law." (Tr. p. 225.) And the above system and status, although theoretically ended by Mexican independence, yet, in fact, persisted long after that time. Since, however, Indians were numerous and Spaniards few, and, since the land and mines could be effectively developed and revenue produced only by Indian labor, the home government, as a matter of policy, was sedulous to preserve the Indians, prevent them from revolting and keep them reasonably satisfied. Hence, the King issued a large number of decrees forbidding molestation of them by private persons, and requiring that they be given or left with enough land for their support, with much more of similar import. *None of these enactments was self operative.* Title accrued only when a specific grant was made to an individual or when an Indian village was created or officially recognized as a community and an allotment of land made for its use. The above decrees ordered that *the fact of Indian possession should be respected and that grants should be made where necessary, but conferred no permanent right or immunity as against the Crown, nor conveyed title from the Crown.*

When Mexico gained its independence, Indians became citizens, sui juris, and could obtain land titles

under the colonization laws like anyone else; but their limited rights to the soil, as previously existing, were in no way enlarged. Under both governments the Indian right, *unless created or supported by official act,* was possessory only and defeasible at the will of King or State. *Under both governments formal recognition by the authorities was necessary before an Indian village acquired the status of a municipal entity, or entity of any kind.* It also had to have a church, and a slight, but definite municipal organization. *It was also necessary that a definite tract of land should be designated and measured off as the communal property.* Without these things there was no entity and no title. *Even with these things no municipal entity, Spanish or Indian, ever acquired the fee title or any title that was not still subject to the control of the Government.*

As against this, appellant's theory seems to be that Aztec titles, existing at the time of the conquest, were acknowledged by Spain and confirmed by the general enactments for Indian protection above noticed; and that, by virtue thereof, an Indian village of immemorial existence and permanency ipso facto had fee title to the land it occupied, even if it consisted of no more than two families, and had no governmental recognition whatsoever.

It would be sufficient answer to say that appellant here does not meet even its own requirements, since there is not a particle of proof that the alleged pueblo existed at all or possessed any land whatever in Spanish days. There is no proof as to how long

it existed in Mexican times, nor what land it then possessed, even if it were possible to identify plaintiff with the "Santa Rosa" of 1850.

However, we proceed with all possible brevity to show that appellant's theory of law is itself unfounded.

1. *The land of the new world upon the conquest was held to be the sole and absolute property in fee of the King of Spain.*

This was partly due to the bull of Pope Alexander VI (Hall, Mexican Law, Secs. 1, 2), but the real source of title was the discovery and conquest of America.

> "While the different nations of Europe respected the rights of the natives as occupants, *they asserted the ultimate dominion to be in themselves;* and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil while yet in possession of the natives. These grants have been understood by all to convey a title to the grants subject only to the Indian right of occupancy. The history of America from its discovery to the present day proves, we think, the universal recognition of these principles. *Spain did not rest her title solely on the grant of the Pope.* Her discussions respecting boundary with France, with Great Britain, and with the United States, *all show that she placed it on the rights given by discovery.*"
>
> Johnson v. McIntosh, 8 Wheat. 543, 574.

"Although the conquest be made by subjects of their own motion and at their own expense, the provinces, lands, towns and *real property belong to the crown.*"

Solorzano, Politica Indiana, Book 1, Chap. 9, Sec. 16.

"The justice and legitimacy of the *supreme dominion* established by the Spanish Kings *over lands inhabited by Indians* at the time of their discovery may be based upon the fact that, when discovered, the Indians were so barbarous and uncivilized that they hardly deserved the name of men and were, therefore, in need of someone to govern, protect, educate and civilize them and render them capable of receiving the Christian faith and religion."

Ibid. Sec. 19.

Since we will have occasion to cite this authority again, we append the following

"The great authority on the laws of the Indies is Pereyra y Solorzano, Jurisconsult, who was a public attorney and judge in the Indies, and a member of the Council of the Indies."

Walton, Civil Law in Spain and Spanish America, p. 521.

Solorzano is also quoted as an authority in White's New Recopilacion, Vol. 1, pp. 367-372; Vol. 2, p. 103, and by the Supreme Court in Chouteau v. Maloney, 16 How. 203, 237, 239.

A striking announcement of the same doctrine is found in Book 4, Title 12, Law 14, of the laws of the Indies quoted in 2 White Recop., p. 52, and commencing:

> "*Whereas, we have fully inherited the dominion of the Indies; and whereas the waste lands and soil which were not granted by the Kings our predecessors, or by ourselves, in our name, belong to our patrimony and royal crown,* it is expedient that all the land which is held without justice and true title be restored as belonging to us", etc.

This law will be more fully examined later on, and is discussed by Garza-Aldape (Appendix, p. 185).

Much more to the same effect might be added, as, for example, Solorzano, Pol. Ind. Book 1, Chap. 9, Secs. 14, 20, 25-32; Book 11, Chap. 10, Sec. 1; also Wistana Luis Orozco, Legislacion y Jurisprudencia Sobre Terrenos Baldios, mentioned as authority by Aldape, who says (Vol. 2, p. 765) referring to the Royal Cedula of November 10, 1591:

> "The royal cedula cited established the legal principle that all the conquered lands belonged in full dominion to the royal crown of Spain,—an arbitrary disposal which deprived, with the solemnity of a royal decree, the ancient inhabitants of the country of the legitimate property rights and titles they enjoyed over the soil."

Again, after quoting the law of November 20, 1578, and that found in Book 4, Title 12, Law 14, of the Recopilacion, partly quoted above, he says:

> "In the Spanish legislation, we find the compiled laws (Title 12, Book 7, Novissima Recopilacion * * * in which is found clearly expressed the supreme and original lordship of the State over the Spanish soil."

2. *The necessary result of the foregoing is that after the conquest no private land titles could exist unless they emanated from the Crown.*

It is true that the fact of Indian possession remained, but it was a possession by grace and tolerance. In flat contradiction to appellant's theory that the pre-existing Indian rights or titles persisted, Orozco says (Vol. 2, p. 767):

> "This validity was never recognized in the case of the titles issued by the native authority of Anahuac (Mexico), as is easy to understand, considering the nature of the conquest, as well as the context of the royal cedula transmitted to Cortez through the medium of the viceroy, Don Antonion Mendoza, issued at Madrid on the 2nd of October, 1525."

To the same effect see,

Orozco, Vol. 2, p. 902.

Francisco de la Maza, Codigo de Colonizacion y Terrenos Baldios, p. 6.

Again,

> "We find that our royal Kings hold this right in the Indies; wherefore, *with the exception of*

such lands as he may have graciously granted to cities, towns, villages, other communities, or private persons, all the rest, and especially all that is uncultivated, does and should belong to his crown and dominion, to be held as despotically and absolutely as we know they were held by the Montezumas in New Spain, by the Incas in Peru, and by the Caciques in other parts of the Indies."

Solorzano, Pol. Ind., Book 6, Chap. 12, Par. 3.
Ibid., Book 2, Chap. 24, Secs. 41, 42.

It is unnecessary to accumulate Spanish authorities to this effect, because the principle that titles in Mexico could exist only by royal grant, and that such grants were made without regard to Indian occupancy, is authoritatively established by our Supreme Court.

3. *Supreme Court decisions holding that Indians had an occupancy right only, and that Spain could and would convey land in the occupancy of Indians, authoritatively prove both of the preceding points.*

The leading case of Johnson v. McIntosh, 8 Wheat. 543, 573-4, 586, 590, 602, has already been cited. The Court's attention is respectfully called to the whole decision, especially to the pages above designated.

In Marsh v. Brooks, 14 How, 513, 521, speaking of Spanish usage in Louisiana, it is said:

"The Indians were kept quiet and at peace with Spanish subjects by kind treatment, and due precautions which did not allow obtrusion

on lands claimed by them without written permits from the governor, *but that such permits were usual cannot be doubted.*"

Later, in speaking of a cession from Indian tribes to the United States of a stretch of territory, the Court says:

"Within which cession lay a great mass of Spanish orders of survey and grants in regard to which this country has been legislating and adjudicating for nearly fifty years without any one ever supposing that such concessions were affected by the loose Indian pretensions set up to the country at a time when the concessions were made; *pretentions that the Spanish government notoriously disregarded, further than a cautious policy required*" (p. 522).

Quotations might be multiplied indefinitely. The following cases fully establish our position:

Cherokee Nation v. Georgia, 5 Pet. 1, 17, 47.
U. S. v. Fernandez, 10 Pet. 303-4.
U. S. v. Rogers, 4 How. 567, 571-2.
U. S. v. Cervantes, 59 U. S. 553.
U. S. v. Cook, 86 U. S. 591, 593.
Beecher v. Wetherby, 95 U. S. 517, 525.
U. S. v. Kagama, 118 U. S. 375, 381.
Buttz v. Northern Pacific R. R., 119 U. S. 55, 66-7-8.
Spalding v. Chandler, 160 U. S. 394, 402-3.

Appellant cites numerous Spanish laws for the protection of Indians in their possessions. These are

merely an expression of the "cautious policy" mentioned in *Marsh v. Brooks, supra, and amount to nothing more than a preservation of the occupancy fact or right only.* Time does not permit the examination of them in detail, but the closer the scrutiny the Court is able to give them, the more convinced will it be that this is their purpose and limit. This also is authoritatively shown by the above Supreme Court decisions, which coincide with, and doubtless in part follow, various Spanish and Mexican enactments showing Indian occupancy to be subject to the control and disposition of the government. For example:

(a) The decree found in 2 White, Recop. p. 48 Recop. de las Indias, Book 4, Tit. 7, Law 23), where the King, while requiring all possible forbearance on the part of Spaniards making settlements among Indians, says:

> "And, if, nevertheless, they do withhold their consent, the settlers * * * shall proceed to make their settlements without taking anything that may belong to the Indians, and without doing them any greater damage than necessary for the protection of the settlers and to remove obstacles to the settlement."

Clearly, the settlers could not establish their community or town without, to some extent, dislodging the Indians, and the King, by this law, delegates to such settlers a portion of his right to extinguish the Indian possession.

(b) The Royal Ordinance found in 2 White Recop., pp. 70, 72, for the promotion of the cul-

tivation of cochineal, flax and hemp, provides for a distribution of lands among Indians, and says:

> "For my royal pleasure is that all said natives may own a competent amount of real property, and that the lands which shall be distributed for the aforesaid objects * * * may belong to these individuals to whom they shall have been *allotted*, whether they be Indians or belong to other classes, together with the necessary right of property; *retaining always the right reserved to my royal crown and to the public dominions respectively.*"

If any of the allottees fail to improve the lands, "*The same shall be taken from them* (which I command to be done without mercy) and granted to others who shall fulfill the conditions" (p. 71).

This enactment, like many others, instructs the Viceroy to make grants to Indians in proper cases, and doubtless many such grants were made. It also shows that even the grant to Indians was conditional. Without a grant, there was nothing but a general rule of protection of Indian occupancy.

(c) The circular of instructions issued by President Juarez of Mexico in 1867 (Hall's Mexican Law, Secs. 645-649) requiring that, when public lands are adjudicated, care must be taken to avoid injury to third parties, states that

> "such injury does not exist, strictly speaking, in respect to the lands which are in possession

> of the Indians *when they lack their respective title given by competent authority*".

Its requirement that the Indians appear and solicit title to the lands they possess,

> "under the conception that said title be issued to them gratis, *the property being thus legitimized which might otherwise be claimed*",

although referring to the situation created by the disamortization law of 1856, whereby Indian pueblos theretofore officially recognized were extinguished and the property escheated to the State, yet expresses the general idea of Mexican law, disallowing any right of Indian possession not based on formal title. (Estanol, Tr. pp. 415, 416, 419, 420; Garza-Aldape, Appendix, pp. 191, 196.)

(d) An assertion of the same principle was made by the Commission which in 1815 examined the famous Apelousas County claims in Louisiana. Appellant's exact contention that the Indian title was the best of all titles because the orginal property of the soil was in them and that it was held sacred by Spain after the conquest, was there urged, but the Commission decided that Spain "recognized no title in them (the Indians) independently of that derived from the Crown—a mere right of occupancy at the will of our government." (p. 252.)

2 White Recop., pp. 247-255.

Similarly as to titles in California after the treaty of 1848, "all lands in California *not included within*

the limits of grants, made in conformity to law and prior to July 7, 1846, formed a part of the public domain of Mexico."

Halleck's Report on California Land Titles, p. 15.

As to the settlement of agricultural Indians, "they have a *right of occupancy* in the land which they need and use".

Ibid., p. 113.

4. *The status of Indians as serfs and the practice of removing them to and concentrating them in settlements at the Government's pleasure are inconsistent with a recognition of indepedent land ownership, or any higher right than a possession subject to the control of the Government.*

This is a collateral matter, and, in view of the abundance of direct authority will not be dwelt on.

"The Indians, after the conquest, were at first slaves; they paid a capitation tax to the crown and their labor was entirely at the service of their lord. This system was modified from time to time, but all the changes carried into effect down to the revolution did not release them from their state of vassalage. They still continued liable in a greater or less degree to the performance of compulsory labor under the orders of persons against whom they had no portection."

Walton, Civil Law in Spain and Spanish America, pp. 521-2.

"The nature of the Indian is such that he is neither to be allowed complete freedom, nor is he to be condemned to complete servitude."

Solorzano, Pol. Ind., Book 2, Chap. 6, Sec. 45.

Notwithstanding the theoretical equaliy of Indians with other Mexican citizens after Mexican indepedence, they were still liable to forced labor. One of the regulations of Governer Figueroa of California dated August 9, 1834, says:

"Article 16. The emancipated Indians will be obliged to assist at the indispensable common labor, which, in the opinion of the governor, may be adjudged necessary for the cultivation of the vineyards", etc.

"Article 18. They (the Indians) cannot sell, burden or alienate under any pretext the lands which may be given them. Neither can they sell their cattle. Whatever contracts may be made against these orders shall be of no value. The Government will reclaim the property *as belonging to the nation*, and purchasers shall lose their money."

Halleck, California Land Titles, p. 44.

The regulations of Governor Alvarado, dated March 1, 1840, empowered the mayordomos.

"Article 6. To compel the Indians to assist in the labors of the community, chastising them moderately for the faults they may commit."

Ibid., p. 52.

There is much more to the same effect in these and similar governmental regulations in California.

As already noted, there was no doubt in the minds of the Spanish authorities of their right to remove the Papagos from their lands and locate them elsewhere, and the Visitador-General twice so suggested. (Tr. p. 223.)

As to reducciones, whereby Indians were concentrated into towns, we find "laws were provided for the *founding* of Indian pueblos or designating the customs they were to have, and limits and privileges". After citing the law on the subject, "It provides that the Indians shall be reduced to pueblos, and that they should not live separated in the mountains, depriving themselves of all spiritual and temporal benefits." (Hall, Mex. Law, Sec. 154, et seq.)

The reducciones were the first examples of establishment or recognition of Indian pueblos as entities. They were the first Indian pueblos in the technical sense of the term, namely, a village recognized by the Government as a municipal entity, and not a mere collection of houses. Later, other Indian villages besides the compulsory settlements called reducciones were recognized, organized and given allotments of land. In both cases, however, it is clear that a certain definite although slight organization, was required.

> "We order that in each town and reduccion, there shall be an Indian Magistrate (alcalde) of said reduccion, and if it exceeds eighty houses, two alcaldes and two councilmen (regidores); likewise Indians * * * all of whom are

to be elected annually in the presence of the curates, as is customary in Spain and Indian towns." (Recop. de las Indias, Book 6, Tit. 3, Law 15.)

"The only jurisdiction which the Indian magistrate shall have shall be to examine, arrest and take delinquents to the prison of the Spanish town in the District." (Ibid. Law 16.)

A vast number of other regulations, far too numerous to mention, were also made to govern reducciones.

Since the Christianization of the Indians was considered of primary importance, a church was essential to the existence of a recognized Indian pueblo (Recop. de las Indias, Book 6, Tit. 3, Law 4), and the church was the center from which measurement of the fundo legal (townsite) and the ejidos (commons) was made. (Hall, Mex. Law, Secs. 162, 153.)

There is no shadow of proof of the existence of alcaldes or regidores in any Papago community, either in ancient or modern times, nor of annual elections, nor of a church until very recently, nor of a fundo legal, nor of ejidos.

It thus appears that the Indians could be shifted at the pleasure of the State unless and until their community had been recognized as a pueblo and a definite grant of land made. Without such recognition, they had nothing but an insecure occupancy. When so recognized and endowed, a definite municipal and religious organization was effected. There

is not a vestige of proof either of recognition, grant, or organization in the case of any Papago village.

5. ***Formal creation and recognition of an Indian community by the authorities was necessary before it became a legal entity, followed by an allotment of land to it proportionate to its size and needs.***

(a) Appellant's theory to the contrary, of course is preposterous. It is absurd to suppose that Spain and Mexico, with their formal ideas of government, permitted the existence of an unknown but large number of *corporate entities, each owning an indefinite area of land*, without accurate knowledge as to which Indian settlements these were, or how many there were, or how much land they possessed. Not only would this be totally at variance with the most elementary ideas of a municipality as an agency and subdivision of government, ideas which Spain fully understood and recognized, but it would also make it impossible to tell at any time how much land was in private ownership and how much was public domain.

(b) Under appellant's theory, Spain would have relinquished from the very start a great proportion of the fruits of the conquest, and would have abandoned, without compensation, much of one of its principal sources of revenue, viz.: the sale of land.

(c) The testimony of Estanol and Aldape on this point is clear and unanimous. Both of these men are lawyers of long experience and high distinction, and familiar with the examination of titles. Estanol was acquainted with titles of Indian pueblos in Sonora. (Tr. pp. 416, 420.) Each had been Secre-

tary of the Interior in Mexico. It is impossible to take time even to summarize their evidence further than to say that Estanol stated that the word "pueblo" has in Spanish both a common and a technical meaning, the first signifying any city, town or village, and the second applied to an Indian community or town accepted by the Government as a legal entity. This required an official act without which the village was simply an aggregation of individuals without any legal status. Without formal official recognition, an Indian village in Sonora up to 1853 had no land title whatever, and could acquire none, because it had no legal entity, and even when recognized as an entity, governmental action was necessary to give it an allotment of land, with very much more to the same effect. All this was confirmed by Aldape. See especially Tr. pp. 412-416, 419, 421, and Appendix to this brief, passim.

It should be noted that the two meanings of "pueblo" are recognized by the Supreme Court when, after stating that there was a pueblo of some kind in Mexican days at San Francisco, it says:

> "We say a pueblo *of some kind*, for the term, which answers generally to the English word 'town' may designate a collection of individuals residing at a particular place, a settlement, or a village, or may be applied to a regular, organized municipality."
>
> Grisar v. McDowell, 73 U. S. 363, 372-3.

The court was here probably speaking of a pueblo of Mexicans, but the passage shows that a distinc-

tion between the common and technical meaning of the word, as testified to by our two Mexican experts, was a matter of judicial cognizance.

We need not rely on expert testimony, however, because in U. S. v. Santa Fe, 165 U. S. 675, 688, the Court says:

> "It may well also be implied from the provisions in the Recopilacion that the rights of the town to hold land for public purposes was *required to be evidenced by grant* from the viceroy or governor, and that such grant, when made, required confirmation by the Crown."

This was said of a Spanish community, but in U. S. v. Pico, 72 U. S. 536, 540, the Court, speaking of an Indian pueblo, said:

> "A pueblo *once formed and officially recognized* became entitled under the laws of Mexico to the use of certain lands for its benefit and the benefit of its inhabitants, and the lands were, *upon petition, set apart and assigned to it by the government.*"

We call special attention to these two cases, the first of which denied a pueblo claim resting on general law, without a grant; while the second, which is the only case found, unless the Faxon case, infra, expressly dealing with an Indian pueblo, shows the need of official recognition for the legal existence of a pueblo, and the need of petition and location before it became legally entitled even to the use of the land.

(d) All the foregoing is conclusively settled by the Supreme Court in

U. S. v. Pico, 72 U. S. 536, 540.
U. S. v. Cervantes, 18 How. 553, 555.
Grisar v. McDowell, 73 U. S. 363, 372-3.
U. S. v. Santa Fe, 165 U. S. 675, 688, 707-8-9, 713.
U. S. v. Sandoval, 167 U. S. 278, 296-7-8.
Rio Arriba Co. v. U. S. 167 U. S. 298, 307.
Townsend v. Greeley, 72 U. S. 326, 336.
Faxon v. U. S. 171 U. S. 244, 258.
U. S. v. Sandoval, 231 U. S. 28, 45.
Harrison v. Ulrichs, 39 Fed. 654, 663.

We mention, without discussion, two matters which are relevant to all stages of this controversy. The first is that the laws of Spain relative to the recognition and creation of Indian pueblos were carried over without change into the jurisprudence of Mexico, and remained in force until after 1853 (Estonal, Tr. pp. 411-12; Garza-Aldape, Appendix pp. 181-2). A general statement as to the retention of all laws of the pre-existing sovereignty is also found in Rockwell, Spanish and Mexican Law, pp. 17-18.

The other point is that, in any case of doubt as to the validity of land titles, the presumption was in favor of the government, just as is the case under our law.

> "There is another right belonging and reserved to our kings and sovereign lords by virtue of the supreme power which they have

over their realms, namely the right to all public lands, fields, pastures, rivers and waters. * * * When in any litigation question arises as to property in, or the right to, or the possession of, any of these things, *the King's right to the same is to be presumed as against all private persons who cannot incontinently show proper titles of ownership.*"

Solorzano, Pol. Ind., Book 6, Chap. 12, Sec. 17.

6. *Even after the formal creation of a pueblo and the allotment of land to it, neither Spanish nor Indian pueblos acquired the fee title.*

"The fee of the lands embraced within the limits of pueblos continued to remain in the sovereign and never in the pueblo as a corporate body."

U. S. v. Sandoval, 167 U. S. 278, 297.

"The disposition of the lands assigned was subject at all times to the control of the government of the country."

U. S. v. Pico, 72 U. S. 536, 540.

Townsend v. Greeley, 72 U. S. 326, 336-7.

Faxon v. U. S. 171 U. S. 244, 259.

The same principle is enunciated in many of the other cases cited in the list preceding.

The result of all the foregoing is that plaintiff, having no governmental recognition, was not an entity, could not own land, and of course had no land assigned to it at the only time when it could have acquired entity or title.

APPENDIX.

pp. 180-209.

The law of Spain, which in Indian matters remained practically unchanged during Mexican sovereignty up to 1853, applied to the territory in controversy when it became part of the United States under the Gadsden Purchase. It is, therefore, regarded as domestic and not foreign law and is the subject of judicial notice in American courts (Fremont v. U. S. 17 How. 541). Since, however, the principles and details of this law were not in fact known to the trial court, both sides produced witnesses to elucidate it. The testimony of two of these, Ygnacio Bonillas, on behalf of plaintiff, and Jorge Vera Estanol, on behalf of defendants, was taken by deposition without objection on the score that it was not properly evidentiary and is, therefore, incorporated as evidence in the transcript, pp. 115, 410. The other two experts appeared in person at the trial, where the court was willing to hear them, but declined to receive their remarks as evidence, although they were examined in open court by question and answer in the ordinary way. These were Toribio Esquivel Obregon on behalf of plaintiff, and Manuel Garza-Aldape on behalf of defendants (Tr. pp. 216, 274). Appellant having incorporated in its brief a portion of Obregon's testimony, appellees append for the information of the court a summary of portions of that of Garza-Aldape, and of the cross-examination of Obregon. Both are too lengthy to permit of complete reproduction.

MANUEL GARZA-ALDAPE.

Qualifications:

Spanish speaking native of Mexico; admitted to practice law in all courts of that Republic. Graduate of National School of Jurisprudence in 1893; practicing continuously in Mexico from 1893 to 1913; member of the National Congress of Mexico for ten years; Minister of Revenue and Gobernacion, corresponding more or less to the United States Department of the Interior, and occupant of other official positions, under the Huerta regime. Law practice in Mexico dealt a great deal with land titles; for last eight years advising on Latin-American matters in office of Curtis, Mallet-Prevost and Colt, New New City, a firm with offices or correspondents in every Latin-American country.

In my study and practice of law, I acquired knowledge of the laws governing the right or title of Indian villages in Mexico to the land they lived on, covering the law of Spain prior to Mexican independence and the Mexican law thereafter. Up to very recently the laws of Spain were in force in Federal matters relating to the creation, organization and legal essentials of pueblos among the Indians.

The word "pueblo" has two meanings. In a general sense it means people. Applied to Indian communities, it also has a technical meaning, viz.: a pueblo duly established or recognized by the authorities. In the technical sense the word "pueblo" never designated a municipality of Spaniards. Their

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communities were called ciudades, villas and lugares, meaning cities, villages and places. Up to 1853 in Mexico the technical names of a municipality of Indians was "pueblo", but that word in its ordinary non-legal sense might be applied either to an Indian or a Spanish village. A "rancheria" is a small rural community which has no entity or jurisdiction. Up to 1853 in Mexico, that word was never used to designate a legally recognized municipality.

Up to 1853, in order that an Indian community in Sonora might become a pueblo in the legal sense of the word, it was necessary to have an act by the proper authorities, the audiencia or governors, authorizing its foundation. After Mexican independence, the laws governing the organization of Indian villages were the same old laws. Mexico made no change in the laws of Spain that had previously governed the creation of Indian Pueblos, but after Mexican independence, the National Congress or the State Congress made the foundation. The fact that a number of Indians had always lived together in a certain place did not make the Indian community a legal entity under the laws of Spain or Mexico. It was necessary, in addition, to have an act founding the town and creating the legal entity. This might be the voluntary act of the Government or the result of an application by the Indians. The general practice of Spain was to center these Indians in towns to Christianize them. If there was no governmental act such as I have described, a community of

(Testimony of Manuel Garza-Aldape.)

Indians that had always lived in the same place had no legal status, and up to 1853 no smaller or less organized community than a pueblo was recognized as a legal entity among Indians. The Indian pueblo was a very rudimentary governmental agency with an alcalde and regiodores (councilmen) with jurisdiction over small police matters. Graver police matters or things requiring higher discretion than police matters were out of their jurisdiction, and they went to the Spanish authority.

If a community of Indians in Sonora had been living in the same place from time immemorial but without formal official recognition, such as I have mentioned, I don't see that it had any right or title to the land it occupied. Mere possession under the Spanish law did not ripen into title. There was no recognition by the government of Spain or Mexico of any right of occupancy in the Indians of a viliage because the elementary theory was that all the lands of Mexico belonged to the King. There were only two ways in which said lands could be divested from the Crown. One was a sale or grant by the King or his representatives. The other was "composition", which is a sort of settlement between the King and the possessors of lands with a paper title, by which they might pay for and acquire said lands.

Up to 1853 the fee title to lands given to an Indian community for the common use of the occupants was in the King, the pueblo having only the use and enjoyment. After the pueblo was recog-

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nized, its lands were of two kinds, "fundo legal" and "ejidos". The former was given for the purpose of distribution among the inhabitants for housing purposes. The latter were given for pasturage or other common use. The fee title of both kinds of land remained in the King, but the inhabitants would acquire fee title to lands and lots of the fundo legal, provided they built houses and remained on the land for four years. The ejidos could never be distributed. They were given for the common use of the people. If, however, the Indian village had not been recognized by the government at all, its status would not be apparent. The Indians would have nothing except a mere tenure of possession. If the pueblo had been recognized and established by the government, I think its usufructuary title was still subject to governmental control or disposition, but I do not remember any law which expressly decides that point. In the case of a village which had not been recognized by the government and merely had possession of the lands, the fee title belongs to the government which has all the rights. Several laws were enacted to allow them to hold title to such possessory lands if they did so and so; otherwise they would be expelled.

If an Indian pueblo was recognized or created as such by the government, a record would be made by giving it a charter which was kept in the archives of the Council of the Indies, and after the independence of Mexico, in the archives of the

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States. If a question arose as to whether an Indian community was a pueblo or not, the evidence produced to settle that question would be the charter.

Neither an Indian pueblo, nor anyone else, could acquire title by prescription against the government to the lands it occupied up to a very recent date. In 1863, a law was enacted in Mexico vacating the old laws which forbade prescription of the lands belonging to the State.

When Book 4, Title 12, Law 14 of the Recopilacion orders that the title of those who hold by a just prescription shall be confirmed, the term "just prescription" is a technical term in Spanish law. This law must be construed along with Law 17 of the same book and title, which shows that prescription is based on a defective title along with possession. The original provision was that prescription could not run against the Indians or the Royal Treasury.

The passage in the same law 14 reading:

> "Whereas we have fully inherited the dominion of the Indies and whereas the waste land and soil which were not granted by the Kings our predecessors or by ourselves in our name belong to our patrimony and royal crown"

is an express statement of the law in regard to the lands of Mexico. It says specially that all lands belong to the crown except those which have been granted by the King or his predecessors. It states that all land belongs to him and the only way in

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which ownership thereof can be acquired is by a grant from him. The same law further says:

> "After distributing among the Indians whatever they may justly hold, to cultivate and raise cattle, confirming to them what they now hold, and granting what they may want besides, all the remaining land may be reserved to us clear of any incumbrance for the purpose of being given as rewards or disposed of according to our pleasure."

That says that Indians might be given lands but a grant is always necessary to acquire something from the Crown. This law and several others contain provisions to protect and favor the Indians. The expression "confirming them in what they have" shows that it is necessary to have an act of confirmation. If there is no such confirmation or gift the Indians under the laws of Spain or Mexico had no title because it was impossible that there should be at the same time two owners of the same thing. This Act was not self-operative. It recognized a superior claim and conferred upon the proper representatives of the King the authority to make a grant to bodies of Indians who were thus given this preferential position. If no such appropriate proceeding were taken whereby a grant would issue, the Act itself commanded no title. In the passage from Chap. 11, p. 91, Vol. 1 of White's New Recopilacion reading

> "To constitute prescription, good faith, just title and capacity of the thing for the purpose

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> and of the person who prescribes are necessary; as also is continued or uninterrupted possession for a determinate time",

the expression "just title" means some title which is sufficient to transfer ownership like a sale, contract or agreement, and is possibly in a manner the same as color of title in American law. The "just title" is one which is not sufficient in itself. As to the requisite of "capacity of the thing for the purpose", the royal domain of Spain or the public lands of Mexico could not be acquired by prescription up to 1863. The passage above quoted is a statement of the underlying general law of prescription in Spain. It is applicable to individuals, but it was not possible to get the lands of the crown from the King by prescription because crown lands were not competent to pass by prescription. In 1863 a law was passed in Mexico allowing prescription against the government.

The passage quoted mentions as another essential for prescription "capacity of the person who prescribes". A community of Indians which had not been formally recognized as a pueblo by the government would not have the capacity to prescribe under that law because it had no legal entity. The article on prescription from Febrero Novisimo found at page 346, Vol. 1, White's New Recopilacion, requires,

> "1.—title of acquisition; that is to say that the thing to be held by purchase, gift, inheri-

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tance, or other of the contracts that transfer dominion; 2.—good faith; 3.—continued possession; 4.—the time prescribed by law; 5.—capacity of the person who prescribed, and of the thing prescribed."

"Title of acquisition" means "just title" which I have explained already. This is an explanation of the same law. The Royal Cedula of 1754 (2 White's Recop. 62-67) had several purposes. One was to make a general inquiry in regard to titles in Mexico, and it established the rule that all lands held in possession with titles prior to 1700, but without confirmation, would be held good if the titles were presented to be annotated. The main purpose was to make a general inquiry so that all lands not possessed with good title might revert to the crown. Titles up to 1700 were confirmed very easily. After 1700 titles were to be presented so that the lands if not surveyed might be surveyed and these titles might be compounded by paying certain fees to the Crown. The purpose was to secure a scrutiny of all outstanding titles and to recover the lands which were held without legal title, but at the same time several ways were provided to make such titles effective. The words "warrants or writings" in paragraph 4 might better be translated "titles or instruments". Where it says in the second division of the same paragraph "If persons have not warrants their proof of long possession shall be held as a title by prescription", this does not at all mean everyone

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who has been in possession of any land because the paragraph says that, it appearing by the titles of instruments that may be presented or by any other means, that they are in possession of such Crown lands by virtue of a sale or composition made by delegates, if they had such composition before the year 1700 they ought to have title which should be one of composition. The second part provides that when they present the paper title it is sufficient for any defect that may be cured. But if they have lost the paper title, then they can prove that they had such possession and such title and then the lands may be compounded. If anyone claiming a prescriptive title did not appear and prove it as required within the time fixed by paragraph 6, the law says that he lost his rights. In order to obtain a title based on prescription under this law, it was necessary to have a title coming from a sale or composition and possession of the land for a certain time and it was also necessary to appear before the official in order that such title might be noted, and if the paper title had been lost, to prove its existence and the fact of the possession. If this was not done, the result under paragraph 7 was that the possessor should be warned that upon failure to comply, the lands should become part of the royal patrimony in order to be sold to others, even though they were cultivated or with buildings on them.

In reply to the statement made in argument that this decree did not apply to Indians at all, I pro-

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duce the work entitled "Legislacion y Jurisprudencia sobre Terrenos Baldios", by Wistana Luis Orozco. This is a compilation of laws relating to Crown lands made "with the official authorization of the Mexican Government in 1895". On p. 131 appears a law of February 15, 1765, reading (witness here read the enactment which recounted previous published warnings to those failing to comply with the Cedula of 1754 and ordered a last peremptory publication, prescribing the method of making it). The law then continues:

> "All possessors who have not already presented their titles, as well as all *Indian pueblos*, which have only the enjoyment of the land granted to them, shall be ordered to appear in person or by attorney" (within specified periods). "* * *. They must be warned that if they fail now to comply with this last and peremptory command, they will be dispossessed of their lands, although they may have them with legitimate title, and that such land shall be sold on the account of His Majesty."

Article 27 of the Mexican Law of 1863, as translated in Hall's Mexican Law, p. 178, reads:

> "The provisions of the ancient laws which declare public lands imprescriptibl are repealed from this date."

The ancient laws referred to are those of Spain about which I have been testifying, and when it

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says that the ancient laws declared public lands imprescriptible, that means that they were so considered up to 1863.

The charter given to an Indian pueblo recognized by the Government might or might not assign a specific tract of land, but the law determines what kind of land may be given, viz.: a fundo legal—in the form of a square, or ejidos (commons) with the boundaries marked. The proceeding was to make a survey, calling in the neighbors in order to ascertain the boundaries of others and fix the pueblo boundaries with the consent of the neighbors. The Spaniards in the new world did not respect the Indian rights of possession very much because the law was enacted to protect the Indians against the Spaniards who were taking the land they had possessed or the land they had by law from the Crown.

Book 4, Title 7, Law 23, of the Recopilacion, translated in Vol. 2, p. 48 of White, relating to Spaniards making settlements among the natives reads in part: "Should the natives attempt to oppose the settlement, they shall be given to understand that the intention in forming it is to teach them to know God and his holy law * * * and not to do them any harm or take from them their settlements * * *. If, notwithstanding, they do withhold their consent, the settlers shall proceed to make their settlement without taking anything that may belong to the Indians and without doing them any greater damage than shall be necessary for the pro-

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tection of the settlers and to remove obstacles to the settlement." This law says clearly that the Spaniards should proceed to make the settlement as mildly as possible, to have the Indians at peace and contented, and to get their consent, and if not, that they make the settlement nevertheless, but try not to arouse the feelings of the Indians against them. The numerous laws in the Recopilacion for the protection of Indians requiring them to be left in possession of their lands; providing that lands should be granted to Spaniards in such manner as not to prejudice the Indians; that the Indians should be left in possession of the lands that belong to them, etc., absolutely do not recognize land titles in the Indians. They were mostly of a political nature and the statement is that they were always ready to give the Indians not title to their lands, but lands for the common enjoyment; but the law itself did not operate to give title. The native Indians had no title which was not subject to disposal of the Crown unless they had received some sort of grant, and I don't believe there is anything contrary to that idea in all these laws for Indian protection. It is absolutely clear to my mind that it was absolutely impossible to give title to any land without a grant of the Crown, and that is more clear after the Royal Order of 1754. The Proclamation or circular of President Juarez issued September 30, 1867, has great official weight. It is a rule of construction. After stating that when public lands are adjudicated

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and title issued care must be taken to avoid injury to third parties, it continues: "And, although such injury does not exist strictly speaking in respect to the lands which are in possession of the Indians when they lack their respective title given by competent authority, notwithstanding, the rule has been carried out by reason of equity and public interest", etc. This paragraph states the exact doctrine I have already stated, that the Indians have no title, and if not, they have no right to the possession of the lands themselves. It says that it requires a title given by competent authority, but, nevertheless, they being here, they want to respect them, and give them title which they have not. It also means that unless the Indians have title given by competent authority the lands they are on would be given to others without legal wrong. The passage near the end of the same circular requiring notice to the Indians "who may appear immediately to solicit the respective titles to lands which they are in possession of, even when no one disputes them, under the conception that such title shall be issued to them gratis, the title being thus legitimatized which otherwise might be claimed" means, among other things, that unless they had the title by grant, they had no title which the Government need respect. There is no difference between the principles set forth by this circular and the law of Mexico as to Indian rights up to 1853. The fact that Indians were made citizens and placed on an equality with other Mexicans at the time of

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the independence refers to political and civil classification and did not affect land titles in any way.

Book 6, Title 3, Law 15 of the Recopilacion, when it refers to pueblos means municipalities of Indians recognized by the government, and Laws 16 and 18 of the same title refer to the jurisdiction of the alcaldes in such Indian towns. There is no possibility to speak about an Indian pueblo if it is not recognized by the Government, and wherever you find the word in the Recopilacion with allusion to the Indians, it means that sort of pueblo.

In Book 4, Title 12, Law 19, where it says that communities of Indians shall be admitted to composition in preference to other persons, etc., it means that communities which possess lands without title can be so admitted. I have already said that the Indian towns have not the fee title, but only the enjoyment of the lands in common, but this special title can be compounded. This is a way by which Indian communities not officially recognized may obtain a title (witness corrects the foregoing statement) I misunderstood the question. My idea was, Indians who have a title which in (is) not perfect. If they had been recognized by the viceroys, but without royal confirmation, this was a way to perfect the municipality. It might also refer to Indians who have ownership in common, having acquired a tract of land without dividing it. They could apply for composition like any individual owner.

The Spanish or Mexican idea of the rights of Indians occupying land from time immemorial does

(Testimony of Manuel Garza-Aldape.)

not correspond with the United States law as to the occupancy or possession title of Indians. The only way in which a right can be acquired to land is by grant from the Crown or its successors. The occupancy or possession title of Indians was not recognized in Spain or Mexico.

Book 1, Title 2, Law 5 of the Siete Partidas does not support the idea that the right to be a corporation could be acquired in Spain or Mexico by immemorial prescription. It refers to the way in which a custom or unwritten law may be established and, after first defining "pueblo" in the sense of a group of people, says that if such a group or a majority of it have for a specified period done anything by way of custom and two decisions applying to said custom have been rendered in council without objection and the custom is consistent with right, reason, etc., such custom can be made obligatory as a law. Under Spanish or Mexican law, a community could not acquire municipal entity without some act of the government.

The statement made by counsel in argument that there were two kinds of Indian communities, those which existed before the Spaniards came, and the new reducciones, that the organized pueblo of Indians referred to the second class only, and that the old, immemorial villages were considered municipal entities without any governmental action, is not correct under the laws of Spain and Mexico. The further statement that the Papal Bull which gave title

(Testimony of Manuel Garza-Aldape.)

to the King made the grant conditional upon the King caring for the Indians and leaving them undisturbed in their possession was never recognized by said laws, which expressly say that all the lands belong to the King without making any exception at all.

Cross-Examination.

There were villages or groups of Indians not reduced to pueblos as a fact, but they have no legal standing under the Mexican law. There is no law which makes the definition or distinction that communities of Indians always mean officially recognized communities, but the general laws themselves show that clearly. In support of the proposition that all the land in America belonged to the King and could not be divested except by grant or composition, I also refer to the Royal Cedula of November 1, 1591, reading in part: "I order you that you make that all lands which every person may have or possess in this province without legitimate titles may be vested duly to him. Examine said titles for that purpose, because all is mine and all belong to me." This was reproduced in Law 14, Title 12, Book 4, which commences: "Whereas we have fully inherited the dominion of the Indies and whereas the waste land and soil which were not granted by the Kings our predecessors or by ourselves in our name belong to our patrimony and royal crown." Where the same law reserves everything necessary for the inhabited villages and towns, granting to the In-

(Testimony of Manuel Garza-Aldape.)

dians that which they need, confirming them in that which they now have, and giving them, in addition, that which is necessary, this refers to any rights they may have apart from mere possession. Possession as a fact, not as a right, cannot come under the provisions of this law. If Indians had possession with certain rights or titles, they should be protected. If they did not have them, they had absolutely to obtain lands from the crown which was ready to give those lands to them. If the Indians had grants, although imperfect and not confirmed, they might have rights which should be confirmed. The law says give the Indians lands for their labors or for what they need, but that is not an actual gift. It is a promise. Until this is done there is no basis for any right. It also says that as to what they have, we must proceed to an act of confirmation and if this is fulfilled, they may have it. These limitations and as well the requirement to give them in addition what may be necessary all require an act and confirmation. All these things mean grants. A confirmation is nothing but a grant, because the King may allow them any claim they have against a particular piece of land. Such confirmation would be in the form of a paper or grant.

Composition presupposes previous title, and mere possession is not a matter of composition. A man may have possession of a thing, but no matter how long he has it he has no right to it, but he may have a thing with a right to acquire it, and then it is

(Testimony of Manuel Garza-Aldape.)

called possession. Indians could acquire property individually or as pueblos, and individuals who acquired and held land in common could compound that like any other individuals, and the expression communities of Indians means either a recognized pueblo or unrecognized group possessing lands in common. I have examined several titles in Indian communities of that kind. Such a group of so-called owners has no entity.

It is impossible to think of any village or community or Indian pueblo without license from the King for the organization. (Witness reads from the Ordenanzas on Lands and Waters, p. 102, an authority referring especially to Mexico, and published in 1856.) It is impossible to think of the founding of a town without royal license.

The Juarez circular of 1867 states what the disposition of the Mexican Government was in regard to Indians at that time. It was the owner of the lands which had not been granted or acquired by private persons, so the owner says to the Indians: "Although you have not title, I am ready to give you one." That was a letter of instruction by an Executive Department and was sound if the President or his Minister understood the law aright.

The Spanish Kings tried to protect the Indians in every way, but the Spaniards who came to America did not care much for the protection of the Indians, and that was precisely why these laws were enacted.

As to the proposition that the ejidos were devoted

(Testimony of Manuel Garza-Aldape.)

to the common use of the inhabitants and could not be converted into a fee title. I quote the official Codigo de Colonizacion y Terrenos, by Francisco L. Maza, p. 21. This collection shows Royal Cedula No. 23 of May 20, 1611, making a grant to an Indian pueblo and containing these words: "I call these lands crown lands because they are given for the common use of all the inhabitants of the pueblo and because the ownership in said properties were subject to the King, and the use of them was granted to the subjects; and because said lands are to be held in common they cannot be sold or pledged."

"Just title" means prescription under color of title, and the occupancy of a particular piece of land for 40 years without paper title could not result in title under the old Spanish law.

I think the Juarez Circular of 1867 is analogous to a circular of instructions issued by the General Land Office of this country expressing the construction that office places on the law. It says that the Indians who have mere tenancy, no matter for how long a time, have not title and they need to have one, and the Government is ready to give them one. That circular did not in any way alter the general view of Mexican law up to 1863. (Original Transcript of Testimony, pp. 370-449.)

In the United States District Court
for the District of Arizona

October 1938 Term — At Phoenix

MINUTE ENTRY OF
WEDNESDAY, MARCH 1, 1939
(Prescott Division)

Honorable Dave W. Ling,
United States District Judge, Presiding.

E-190

THE UNITED STATES OF AMERICA, as Guardian of the Indians of the Tribe of Hualpai in the State of Arizona,

Plaintiff,

vs.

SANTA FE PACIFIC RAILROAD COMPANY, a corporation,

Defendant.

Defendant's Motion to Dismiss having been argued, submitted and by the Court taken under advisement, and the Court having duly considered the same, and being fully advised in the premises,

It Is Ordered that said Motion to Dismiss be and it is granted, and that this case be and it is dismissed. [252]

[Title of District Court and Cause.]

SUPPLEMENTAL ORDER AND OPINION

The Court, having heretofore and on the first day of March, 1939 entered its judgment herein granting the motion of the defendant to dismiss the case and ordering the case dismissed, deems it best to file herein the conclusions upon which such order and judgment are based.

It Is Therefore Ordered that this opinion shall be filed in the records in this cause and become a part of them and supplementary to the said judgment heretofore entered, the Court's conclusions being hereinafter set out.

The motion to dismiss in this case was extensively briefed and argued; in defendant's original brief, plaintiff's brief and defendant's reply brief, the Court has had the benefit of the exhaustive researches of counsel into the public records of the nation bearing upon the public history affecting treaties and laws and the course of their administration, of which the Court has judicial knowledge. In the interest of brevity, the Court will state its conclusions and refer to the sources of information indicated in the points and authorities attached to defendant's Motion to Dismiss, from which the Court has drawn its [253] conclusions, specifically referring in these findings only to such sources of information to which the Court has had recourse which are not indicated in such points and authorities but which were referred to by the parties in briefs and oral argument.

The Court finds:

1. The crucial issue is whether the Walapai Indians had some nature of right to the lands here in issue which prevented the grant made by the Act of July 27, 1866, 14 Stat. 292, from becoming operative as to them. This grant was in praesenti, taking effect by relation from the filing of the Map of Definite Location, March 12, 1872.

2. The Walapai were of the savage tribes referred to in the Treaty of Guadalupe Hidalgo, 9 Stat. 922. It is not claimed they were granted lands by Spain or Mexico. Sources and authorities referred to by defendant in support of its points IB and ID, and the sources and authorities referred to in appendix to defendant's original brief, here referred to and made a part hereof, are conclusive that these Indians had no rights to the land in controversy under the laws of Spain and Mexico; and from the brief and argument of plaintiff it is clear that it does not and cannot controvert this point. In considering the Treaty of Guadalupe Hidalgo, the Court was referred to and has considered the protocol thereto, and Senate Executive Document 52, Thirtieth Congress, First Session, "Proceedings on the Treaty of Guadalupe Hidalgo."

3. For plaintiff to prevail, it must show some act of the legislative or executive departments of the government creating some right in the Walapai Indians superior to the rights of defendant under the Granting Act. Such an act would necessarily be a public one. Not only has plaintiff been unable to

produce record of such, or suggest the existence of such, but the researches of the Court fail to show the existence thereof. [254] Further, the sources and authorities cited by defendant in its points and authorities, Points ID, IE and IF, show beyond possibility of challenge:

(1) that it was not the policy of the United States to accord these Indians any possessory or other right because of any alleged occupancy claim;

(2) that their only right was to such reservations as were lawfully established for them, viz., the lower Colorado River reservation established by statute in 1865, and the even but not the odd numbered sections of the Walapai reservation established by executive order in 1883;

(3) that the lands of Arizona were from their acquisition public domain open to sale and grant; and

(4) that the Congress intended to grant and did grant to the Atlantic and Pacific Railroad Company, to whose rights defendant is successor, the lands here in controversy, except such as were reserved or disposed of to settlers, or subject to lawful claims or rights, prior to March 12, 1872, as a means of opening the country to white development and solving the corollary problem of subduing and controlling the Indians. Plaintiff's theory of public policy directly contradicts the public policy announced by every act of Congress relating to the problem and the actual course of administration by the executive branch pursuant to lawful authority.

The Court's conclusion in this respect has been in part drawn from consideration of the instructions from the Commissioner of the General Land Office, approved by the Secretary of the Interior, to the Surveyor General of New Mexico on August 21, 1854, appearing at page 398 of Donaldson's work on The Public Domain, and consideration of Pueblo Indian Land Hearings, Subcommittee on Public Lands, Sixty-Seventh Congress, Fourth Session, on S-3865 and S-4223, California Indians Jurisdictional Act Hearings, Committee on Indian Affairs, [255] United States Senate, Seventy-Fourth Congress, First Session, on S-1793 (Government Printing Office 1935), Hearings before the Committee on Indian Affairs, United States Senate, Seventy-Fifth Congress, First Session, on S-1651 and S-1779 (Government Printing Office 1937), and an extensive examination of House Executive Document 1, Part 5, Forty-Second Congress, Third Session, Report of the Secretary of the Interior (1872) and documents transmitted with it by the President to Congress; I have also considered the Eighteenth Annual Report of the Bureau of American Ethnology.

4. Had there been any rights in these Indians such as plaintiff asserts for them, there is no doubt that they were extinguished by acts of Congress and lawful acts of the executive pursuant to sovereign political prerogative, in such time and manner that the existence of such rights would not have interfered with the attachment of the railroad title. I have arrived at this conclusion from the sources and

authorities referred to in support of its point II by defendant.

5. I find that the sources and authorities cited by defendant in support of its Point III establish beyond possibility of question:

(1) That both Congress and the Executive have conclusively confirmed defendant's title to the lands in issue so that it must prevail against any attack by the United States;

(2) That the lands in issue were never reserved to the Walapai, but granted to defendant's predecessor in title and confirmed to defendant;

(3) That the railroad's title to the odd numbered sections of the Walapai Reservation was not affected by the executive order of Jan. 4, 1883, and has since been conclusively confirmed by the Congress and Department of the Interior;

(4) That there is no basis for any claim of adverse possession as respects the first cause of action.

6. The controlling elements of this case, namely, the laws of Spain and Mexico, the Legislation of Congress, and the course of administration, are matters of judicial knowledge. It is perfectly clear that no evidence adducible would in any way affect the result of the case. The plaintiff has conceded that the only evidence it can offer cumulating what the Court judicially knows would go to the question of tribal organization of the Walapai, the issue whether the Walapai possessed any country at all (as distinguished from being mere wanderers in a land of other wanderers), and lastly the question of the extent of country possessed, or over which they

wandered, as the case may be. No evidence upon the issues plaintiff desires to prove would enable plaintiff to escape the controlling effect of public law and public administration, which the Court judicially knows, which cannot be controverted by evidence and which requires dismissal of the case.

Done this 6th day of March, 1939.

DAVE W. LING
Judge

[Endorsed]: Filed Mar. 6, 1939. [257]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS UNDER RULE 73

Notice is hereby given that The United States of America as Guardian of the Indians of the Tribe of Hualapai in the State of Arizona, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit, from the order and judgment sustaining defendant's motion to dismiss and dismissing the complaint of the plaintiff entered in this action on March 1, 1939, and from the supplemental order and opinion entered in this action on March 6, 1939.

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United States Attorney for
the District of Arizona
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Pueblo Indians,
802 First National Bank Bldg.,
Albuquerque, New Mexico.

[Endorsed]: Filed May 27, 1939. [258]

[Title of District Court.]

CLERK'S CERTIFICATE

United States of America,
District of Arizona—ss:

I, Edward W. Scruggs, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of The United States of America as Guardian of the In-

dians of the Tribe of Hualpai in the State of Arizona, Plaintiff, versus Santa Fe Pacific Railroad Company, a corporation, Defendant, numbered E-190 Prescott, on the docket of said Court.

I further certify that the attached pages, numbered 1 to 264, inclusive, designated as Volume One of Transcript of Record; and Brief of Defendant in Support of its Motion to Dismiss the Complaint, designated as Volume Two of Transcript of Record, and Reply Brief of Defendant Answering Plaintiff's Brief filed with Respect to Defendant's Motion to Dismiss, designated as Volume Three of Transcript of Record, which said Volumes Two and Three are transmitted herewith, contain a full, true and correct transcript of the proceedings of said cause and all the papers filed therein, together with the endorsements of filing thereon, called for and designated in Appellant's Designation of Contents of Record on Appeal and Appellee's Desigation of Additional Contents of Record on Appeal, filed in said cause and made a part of the transcript therein, as the same appear from the originals of record and on file in my office as such Clerk, in the City of Phoenix, State and District aforesaid.

I further certify that the Clerk's fee for preparing and certifying to this said transcript of record amounts to the sum of $98.35, and that a memorandum of said sum has been entered in said cause by me for services rendered on behalf of the United States.

Witness my hand and the seal of the said Court this 22nd [265] day of August, 1939.

[Seal] EDWARD W. SCRUGGS,
Clerk

By WM. H. LOVELESS
Chief Deputy Clerk. [266]

[Endorsed]: No. 9271. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, as Guardian of the Indians of of the Tribe of Hualapai in the State of Arizona, Appellant, vs. Santa Fe Pacific Railroad Company, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Arizona.

Filed August 24, 1939.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 9271

UNITED STATES OF AMERICA as Guardian of the Indians of the Tribe of Hualapai, in the State of Arizona,

Appellant,

vs.

SANTA FE PACIFIC RAILROAD COMPANY, a Corporation,

Appellee.

Appeal From the United States District Court
for the District of Arizona

STATEMENT OF POINTS TO BE RELIED UPON BY APPELLANT TOGETHER WITH DESIGNATION OF PARTS OF RECORD.

Pursuant to Rule 19(6) of the Rules of the United States Circuit Court of Appeals for the 9th Circuit, Appellant makes the following statement of the points upon which it intends to rely in the Appeal together with designation of the parts of the Record necessary for the consideration thereof:

I.

At all times material the Walapai Tribe of Indians have been in the possession and occupancy of the lands described in the Complaint.

II.

On the effective date of the railroad grant of July 27, 1866, c. 278, 14 Stat. 292, the Walapai Tribe of Indians had a right to possess and occupy the lands described in the complaint and that right never has been extinguished.

III.

The railroad grant of July 27, 1866, c. 278, 14 Stat. 292, did not operate as to the land described in the Complaint because that land was not public land and because that land was "reserved" and "otherwise appropriated" and subject to "other claims or rights" within the meaning of the grant; therefore, the United States is the owner in fee of that land subject to the unextinguished right of possession and occupancy in the Walapai Tribe of Indians.

IV.

Any rights or title to the odd-numbered sections within the Walapai Indian Reservation that the railroad may have acquired under the railroad grant of July 27, 1866, c. 278, 14 Stat. 292, have been forfeited by reason of the failure of the railroad's predecessor in title to comply with the terms of the grant and to complete the construction of the road to and through the Walapai Indian Reservation within the time required under the terms of the grant and prior to the formation and creation of the Walapai Indian Reservation.

V.

The United States is the owner in fee by adverse possession of the odd-numbered sections of land within the Walapai Indian Reservation.

VI.

Any right or title to the lands described in the Complaint that the railroad may have acquired under the grant of July 27, 1866, c. 278, 14 Stat. 292, are subject to the unextinguished right of occupancy and possession of the Walapai Tribe of Indians in those lands.

The parts of the Record necessary for the consideration of the points relied upon, are as follows:

1. The Complaint.
2. Motion to Dismiss Plaintiff's Complaint.
3. Order and Judgment of the District Court sustaining Motion to Dismiss.
4. Supplemental Order and Opinion of the Court entered March 6, 1939, together with the material therein incorporated by reference.

THE UNITED STATES OF AMERICA,
As Guardian of the Indians of the Tribe of Hualapai, in the State of Arizona, Appellant.

By R. H. HANNA
Special Assistant to the
Attorney General
806 First National Bank Bldg.,
Albuquerque, New Mexico.

[Endorsed]: Filed Aug. 24, 1939. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

APPELLEE'S DESIGNATION OF PARTS OF RECORD TO BE PRINTED

Pursuant to Rule 19 (6) of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit, Appellee designates the following parts of the record to be included in the printed record:

1. Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss plaintiff's Complaint, which Memorandum was filed in the District Court on the 31st day of March, 1938, as a part of the Motion to Dismiss Plaintiff's Complaint.

2. Appendix to Brief of Defendant Santa Fe Pacific Railroad Company in support of its Motion to Dismiss the Complaint, which brief was filed in the District Court on the 3d day of May, 1938.

CHAS. H. WOODS
JOYCE CCX
H. M. FENNEMORE
HENRY W. ALLEN
J. EARLY CRAIG
V. T. BLEDSOE
RICHARD FENNEMORE
Counsel for Appellee.

[Endorsed]: Filed Sep. 1, 1939. Paul P. O'Brien, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt From Proceedings of Friday, March 29, 1940

Before WILBUR, MATHEWS, and HEALY, Circuit Judges

Order of submission

Ordered appeal in above cause argued by Mr. Norman MacDonald, Attorney, Department of Justice, counsel for appellant, and by Mr. Joyce Cox, counsel for the appellee, and submitted to the court for consideration and decision.

United States Circuit Court of Appeals for the Ninth Circuit

Excerpt from Proceedings of Friday, August 30, 1940

Before WILBUR, DENMAN, and HEALY, Circuit Judges

Order directing filing of opinion and filing and recording of decree

By direction of the Court, ordered that the typewritten opinion this day rendered by this court in above cause be forthwith filed by the clerk, and that a decree be filed and recorded in the minutes of this court in accordance with the opinion rendered.

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 9271—Aug. 30, 1940

UNITED STATES OF AMERICA, AS GUARDIAN OF THE INDIANS OF THE TRIBE OF HUALAPAI IN THE STATE OF ARIZONA, APPELLANT

vs.

SANTA FE PACIFIC RAILROAD COMPANY, A CORPORATION, APPELLEE

Upon Appeal from the District Court of the United States for the District of Arizona

Before WILBUR, MATHEWS, and HEALY, Circuit Judges

WILBUR, Circuit Judge: This suit was brought by the United States in its own behalf and as guardian of the Walapai [1] Tribe of

[1] (Variously spelled Hualpai, Hualapai, or Walapai, etc.)

Indians of Arizona to enjoin the defendant, Santa Fe Pacific Railroad Company (hereinafter called the Santa Fe Railroad Company, or, the Railroad Company) from interfering with the alleged possessory rights of that tribe to certain lands in northwestern Arizona.

The lands to which these possessory rights are claimed were included within the grant made to defendant's predecessor, the Atlantic and Pacific Railroad Company, by Act of Congress of July 27, 1866, (14 Stat. L. 272). This act granted the odd-numbered sections of land within specified distances on each side of the line of railroad to be constructed, the specific sections to be identified later. This identification was fixed March 12, 1872, when the map of the proposed railroad was filed and accepted.

In 1864 a reservation for the Walapai Tribe was created by Congress (13 Stat. 569) on lands on the lower Colorado River not within the limits of the railroad grant.

In 1883 another reservation for this tribe was created by proclamation of President Arthur. This reservation was in northwest Arizona and included lands covered by said railroad grant.

The complaint contains two counts: the first, for interference with the possession of lands within the boundaries of the reservation created in 1883; the second, for interference with the possession of lands within the odd numbered sections outside this reservation and within the limits of the grant.

Defendant moved to dismiss the complaint on the ground that it failed to state a cause of action, in that matters of which the court took judicial notice showed that the Walapai Tribe had no possessory rights as alleged. The court granted the motion and the plaintiff appeals.

The act of 1866 limited its grant of alternate sections with these words: "whenever the United States have full title, not reserved, sold granted, or otherwise appropriated, and free from prescription or other claims or rights." Literally this requires that no section is within the grant unless it is free from "all other claims or rights" and certainly a right of possession would fall within that description. A logical consequence of that interpretation would be that if the Walapai Tribe had their alleged possessory rights the lands to which they applied were not covered by the grant and the Railroad Company would be entitled to lieu lands. (Act of 1866, sec. 3.) However, in construing a similar grant of lands in Dakota, made by Congress July 2, 1864, to the Northern Pacific Railroad, in Buttz v. Northern Pacific Railroad, 119 U. S. 55, the Supreme Court held that an identical limitation did not exclude from the grant lands to which the Indians had a right of occupancy only. This conclusion was partly based upon the provision in the granting act wherein the

United States agreed to extinguish the Indian title to all lands falling under the operation of the act. The same provision is in the granting act to the Atlantic and Pacific. (Sec. 2, Act of July 27, 1866, 14 Stat. 292.) The Supreme Court said:

"In our judgment the claims and rights mentioned in the third section are such as are asserted to the lands by other parties than Indians having only a right of occupancy."

The word "occupancy" is used interchangeably with "possession" in appellant's brief.

Appellant concedes that the grant of 1866 to defendant's predecessor in interest, the Atlantic and Pacific Railroad Company, passed the fee to the lands in question; but it contends nevertheless that the grant was subject to the Tribe's possessory rights in whatever lands they actually occupied.

The first question then is as to the origin of the right of Indian occupancy which is herein asserted to be superior to the railroad grant. The right, if any, at the time the grant became effective in March 1872, is the one involved for after the grant vested it could not be subsequently divested by any act of the government or of the Indians.

Appellant argues that there is uniform governmental policy of recognizing rights of occupation as vested in all Indian tribes with respect to land actually occupied by them at the time they were brought under the sovereignty of the United States and that such rights were good against all but the government of the United States. It must be conceded that this view is consistent with what has been the common practice in dealing with the Indians occupying lands other than lands within the area ceded by Mexico to the United States. Cf. Bates v. Clark, 94 U. S. 294; Spaulding v. Chandler, 160 U. S. 402, 403. Their practice, has been based upon the policy of maintaining just and peaceable relations with the Indians and is discussed and considered in a number of early cases, such as Johnson v. Graham, 8 Wheat. 543, decided in 1823.

But, since the whole of the Indians' title depends entirely upon the policy of the federal government, it is obvious that what may have seemed the best policy in dealing with Indians in territories acquired prior to the treaty of Guadalupe Hidalgo might not have seemed the best policy in dealing with Indians occupying the area ceded by Mexico in that treaty.

Appellee argues that since, apart from exceptional instances as in case of the lands of the Pueblo Indians, the Mexican government recognized no rights in the Indians with respect to lands in this area at the time of the cession, they cannot be deemed to have acquired any such rights of possession in the absence of affirmative action by the United States. To this appellant replies that there

is no sound reason for assuming a discrimination against the Indians of the Mexican cession. In support of appellant's contention a case decided by this court, United States v. Walker Irrigation District, 104 F. 2d 334, is cited; but that case merely recognized that the government was under a moral obligation to the Indians of the ceded area of such a nature that the creation of an Indian reservation therein must have carried with it the right to the use of water from a stream within the reservation, water without which the land reserved would be worthless. It is obvious, however, that this case throws little light upon the possessory rights of Indians within the Mexican cession.

Since it is conceded that the title of the United States was absolute, except in certain cases of specific grants, and since there is no all-embracing rule governing the possessory rights of the Indians upon the public domain, their rights within the territory ceded by Mexico must be neither more nor less than what the government, whether justly or unjustly, chose to recognize. And that must be determined from the course of governmental action, as contended by appellee. That question we will now consider.

One of the most significant pieces of legislation by Congress in this connection is the Act of July 22, 1854 (10 Stat. 308), establishing the offices of Surveyor-General of New Mexico, Kansas, and Nebraska. This act (sec. 2) provided for a donation of 160 acres of land to certain settlers. It excepted from the land subject to donation lands claimed under the laws, usages, and customs of Spain and Mexico.[2]

While as to Nebraska and Kansas the Act provided that the only land subject to preemption under the preemption act of 4 September 1841 was land to which the "Indian title" had been or should be extinguished (Sec. 12 of Act of 1854, supra), the Act further provides in Sec. 13, "that the public lands in the territory of Nebraska to which Indian title shall have been extinguished

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[2] The act provided that the Surveyor-General of New Mexico, under instructions given by the Secretary of the Interior, should "ascertain the origin, nature, character, extent of all claims to lands under the laws, usages and customs of Spain and Mexico. * * * He shall make a full report on all such claims as originated before the cession of the Territory to the United States by the Treaty of Guadalupe Hidalgo of 1848, denoting the various grades of title, with his decision as to the validity or invalidity of each of the same under the laws, usages and customs of the country before its cession to the United States; and shall also make a report in regard to all pueblos existing in the Territory, showing the extent and locality of each, stating the number of inhabitants in the said pueblos, respectively, and the nature of their titles to the land. * * * Until the final action of Congress on such claims, all lands covered thereby shall be reserved from sale or other disposal by the government, and shall not be subject to the donations granted by the previous provisions of this act."

On August 21, 1854, the Commissioner of the Land Office, acting with the approval of the Secretary of the Interior, instructed the Surveyor-General of New Mexico, which then included the land now in question, to recognize no title or right in the land that was not recognized by Mexico before the cession as follows:

"It is obligatory on the Government of the United States to deal with the private land titles, and the 'pueblos,' precisely as Mexico would have done had the sovereignty not changed. We are bound to recognize all titles as she would have done—to go that far, and no further. This is the principle which you will bear in mind in acting upon these important concerns."—DonaMson, The Public Domain, 308.

shall constitute a new land district to be called the Omaha District and the public lands in the territory of Kansas to which the Indian title shall have been extinguished shall constitute a new land district."

It seems clear from the foregoing provisions of the Act that Congress recognized in the territory of New Mexico only those Indian rights which existed under Spanish or Mexican law at the time of the cession of the land to the United States by Mexico.

In 1870 Congress provided for the appointment of a Surveyor-General for Arizona and charged him with the duty of investigating Spanish and Mexican land titles therein, in the same manner as the Surveyor-General of New Mexico had done under the Act of 1854. (Appropriation Act, July 15, 1870, 16 Stat. 291, 304.) This Act is significant here only as indicating a continuing policy of recognizing only rights in land theretofore existing in the ceded territory.

On March 3, 1871, Congress enacted a statute prohibiting future treaties with Indian Tribes (16 Stat. 544, 566; 25 U.S.C.A. § 71), thus asserting the right of the government thereafter to define the rights of Indians with or without their consent.

In 1865 Congress validated an agreement made between Arizona's first Indian superintendent and the Walapai and certain other tribes for the establishment of a reservation of 75,000 acres "from Half Way Bend to Corner Rock on the Colorado River." (Act of March 3, 1865, 13 Stat. 541.) If at that time Congress regarded this whole vast area of Arizona as a body of land to which the Indians in actual occupation had possessory rights which it purposed to continue to recognize it is difficult to understand why it should have created this reservation. This act of March 3, 1865, is far more consistent with an intent to limit the poessessory rights of Indians on the Colorado River and its tributaries to the reservation thus created.

Entirely consistent with this view and difficult to understand on any other ground is the Act of July 27, 1866, granting land to the Atlantic and Pacific Railroad Company to finance the construction of the proposed railroad. It must be remembered that this act granted lands to the Railroad Company "for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast * * *" But the fee in a section of land in which a tribe of Indians had a legal right of exclusive occupation would obviously be worth nothing to the railroad or its purchaser. With such an encumbrance no land could be sold and the purpose of the grant would be utterly defeated. In U. S. v. Shoshone Tribe, 304 U. S. 111, a case involving a treaty right of an Indian tribe to possession of land, the court said: "For all

practical purposes the tribe owned the land. Grants of land subject to the Indian title by the United States, which had only the fee, would transfer no beneficial interest."

This seemingly insurmountable difficulty is met by appellant with the argument that, as in the case of the Northern Pacific grant, already discussed, this act specifically provided (in Sec. 2) that "the United States should extinguish, as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession, the Indian title to all lands falling under the operation of this act."

A consideration of the act granting to the Railroad Company as a whole indicates an intent on the part of Congress to avoid defining the Indian rights affected by the railroad. Certainly Congress did not intend in the act, for the benefit of the Railroad Company, to create new and theretofore unrecognized rights in Indians, adverse to the right of the grantee. Throughout the territory traversed by this railroad, and others to which similar grants had been made, there were Indian treaty rights of various sorts, and possessory rights and reservation rights. The debates in Congress, published in the Congressional Globe for March 1 and 2, 1866, relating to the interpretation of this act, indicate a purpose to deal only with existing Indian rights, whatever they might be and wherever situated.

The government relies so strongly upon the holding of the Supreme Court in Buttz v. Northern Pacific Railroad Co., supra, as recognizing and declaring a possessory right in favor of all Indians in possession of government land otherwise undisposed of as to call for a further analysis of that decision. The action was brought by the Railroad Company to recover possession of a small tract of land in the Territory of Dakota, claimed by it under a grant made in 1864 by Act of Congress. The defendant claimed under the preemption law of 1841. The land, said the court, was within "what is known as the Indian country. At the time the Act of July 2, 1864 was passed, the title of the Indian tribes was not extinguished. But that did not prevent the grant of Congress from operating to pass the fee of the land to the company. The fee was in the United States. The Indians had merely a right of occupancy, a right to use the land subject to the dominion and control of the government. The grant conveyed the fee subject to this right of occupancy. The Railroad Company took the property with this incumbrance."

The court went on to say: "In the grant to the Railroad Company now before us, Congress was not unmindful of the title of the Indians to the lands granted and it stipulated for its extinguishment by the United States as rapidly as might be consistent

with public policy." The opinion then recounts various steps taken by the government in fulfilling this policy, steps resulting in the final retirement of the Indians to established reservations and a payment to them for the relinquishment of their claim to possessory rights over the area, including the land in dispute.

Thus it appears that the only thing actually decided by this Northern Pacific case was that by virtue of the grant of 1864 to it and the subsequent extinguishment of the Indians' possessory rights, the Railroad Company acquired not only the fee but a right of possession as against one claiming a right accruing after the grant under the Preemption Act. It decided nothing as to the origin or extent of the Indian rights prior to the Act of 1864. However, though not necessary to the decision, because the right, if any, had been extinguished, the court clearly recognized that the Indians had an undefined right to possession over area on either side of the railroad which it designated as "Indian country" which did not pass to the Railroad Company with the grant of the fee in the Act of 1864 and was not lost until finally surrendered at a later date.

That case did not deal with lands in the territory ceded by Mexico which has a different history of governmental action, Spanish, Mexican and United States. Some of these facts we have already considered, but much of the history cited relates to governmental action after the grant of July 27, 1866.

The Acts above enumerated, it will be observed, were all enacted prior to 1872 when the Railroad Company's rights in the land grant vested. These statutes recognized no rights of the Indians in Arizona other than those existing under Mexican law or created by reservations after the Mexican cession to the United States. These rights did not include possessory rights of Indians. No other Acts of Congress recognized such possessory rights. The rights claimed by the plaintiff on behalf of the Indians were dependent upon a recognition thereof by the United States government. They were not recognized. Even if such rights were recognized and thus given substance they would be extinguished by later nonrecognition. There is thus a clear distinction between the possessory rights of Indians in the territory ceded by Mexico and other areas within the United States derived from other sovereigns wherein Indian rights of possession had always been recognized by that sovereign and continued to be recognized by the United States.

Reference has already been made to the creation of a reservation for the Walapai in 1854–1855. In 1867 the agent at La Paz, Arizona, reported that lack of funds had prevented bringing the Walapai to their reservation. But in 1872, acting under the

authority of President Grant, General Howard ordered all Indians in that section of the country to go to their respective reservations. In 1874 the Walapai were forcibly taken to their reservation. There could not be a more effective denial of the possessory rights of the Walapai to lands outside their reservation than this act of forcible expulsion from such lands by executive action in accordance with the Act of Congress creating the reservation (13 Stat. 541, supra; cf. Buttz v. Northern Pacific R. R. Co., supra).

What has just been said also applies to the second cause of action which concerns lands outside of any Indian reservation; but it is equally applicable to the first cause of action which concerns lands within the reservation which was created for the Walapai in 1883 by Presidential proclamation, subsequently ratified by Congress (Act of February 20, 1925, 43 Stat. 954).

In 1925 Congress passed an act for the consolidation of the Indian lands within the Walapai reservation created in 1883. This consolidation was to be effected by an exchange of some of the Indian lands for private lands "* * * so that the lands retained for Indian purpose may be consolidated and held in a solid area so far as may be possible * * *" (Act of February 20, 1925, ch. 273; 43 Stat. 954). In pursuance of this authority the Commissioner for Indian Affairs negotiated a contract with the Railroad Company under which the Indians were to have a consolidated area of 462,213.18 acres, and the Railroad Company 126,476.88 acres less, that is, 335,736.30 acres. The division was based on value rather than acreage. The estimated value of the lands retained, or transferred to the use of the Indians, was $245,221, and of the Railroad lands retained or procured by exchange was $212,517. At the time of this negotiation there was pending in the United States District Court for Arizona an action brought by the United States on behalf of the Walapai Indians, against the Santa Fe Railroad Company, appellee's predecessor, to determine the right to the waters flowing from Peach Springs which arose on an even-numbered section of land within the reservation and which it was claimed had been appropriated and used for over forty years by the Railroad Company, or its predecessors, on its odd-numbered sections. The proposed agreement for the exchange of lands settled the relative rights of the Indians and of the Railroad Company to the use of the waters of Peach Springs. In pursuance of this agreement a stipulation for a decree in the pending suit was entered into and a decree followed confirming the agreement as to the waters of Peach Springs.

Before the whole agreement was approved by the Secretary of the Interior a committee of the United States Senate held exten-

sive hearings on the question of the rights of the Walapai Indians. The committee had before it the opinion of the Solicitor of the Interior Department, E. C. Finney, addressed to the Secretary of the Interior on September 16, 1931, and an opinion of Seth W. Richardson, Assistant Attorney General, acting for the Attorney General of the United States, dated November 12, 1931, both denying the alleged possessory rights of the Walapai Indians to the odd-numbered sections of land within the Walapai Reservation of 1883. Notwithstanding these opinions the Chairman of the Committee requested the Secretary of the Interior to withhold approval of the agreement until the matter was further considered by the Committee (Walapai Papers, Document 273, 74th Congress, 2d Session, supra). If the rights of the Indians to the land in question were vested, beyond the power of governmental interference, the failure of the negotiated agreement for lack of approval by the Secretary of the Interior perhaps would deprive the Act of 1925, supra, and the negotiations under it, of all significance, except for the consummation of the agreement, concerning the waters of Peach Springs. But the Indian right of occupancy is entirely dependent upon the will of the sovereign. Consequently, the negotiation of the agreement authorized by Congress was a recognition by the sovereign of the right of the Railroad Company to the possession of the odd-numbered sections, although the land was within an area set apart for the use and occupation of the Indians. The teaching of the cases is that the bare fee in the land, which is subject to the Indian right of occupancy, is practically valueless. Hence, no agreement of exchange was necessary unless the right of the Railroad Company to the odd-numbered sections included the right of possession thereto. It is unnecessary to hold that the Act of 1925, supra, and proceedings under it effectively negatived the Indian right of possession, if any, but it is at least cumulative evidence of a purpose of the government to deny a right of occupancy to Indians within the Mexican cession not recognized by Spain and Mexico.

It should be added that the negotiated agreement with reference to the lands within the reservation considered as an act of the sovereign, denying Indian possessory rights, is applicable as well to lands outside the reservation, described in the second count of the complaint.

We conclude that evidence, of which the courts take judicial notice which cannot be affected or overcome by testimony of possession, shows that the Walapai Tribe of Indians in Arizona have no recognized right of occupancy of public lands other than in reservations set apart by the government for the tribe; that this right in the reservation set apart by Presidential proclamation in

1883 is subject to the prior vested right of the appellee to the odd-numbered sections of the grant within the reservation; that the decree should be affirmed as to land in controversy both within and without the reservation.

Affirmed.

[Endorsed:] Opinion. Filed Aug 30, 1940. Paul P. O'Brien, Clerk.

Decree

United States Circuit Court of Appeals for the Ninth Circuit

No. 9271

UNITED STATES OF AMERICA, AS GUARDIAN OF THE INDIANS OF THE TRIBE OF HUALAPAI IN THE STATE OF ARIZONA, APPELLANT

vs.

SANTA FE PACIFIC RAILROAD COMPANY, A CORPORATION, APPELLEE

Appeal from the District Court of the United States for the District of Arizona.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the District of Arizona and was duly submitted.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the order of the said District Court in this cause be, and hereby is, affirmed.

[Endorsed:] Decree. Filed and entered August 30, 1940. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit

No. 9271

UNITED STATES OF AMERICA, AS GUARDIAN OF THE INDIANS OF THE TRIBE OF HUALAPAI IN THE STATE OF ARIZONA, APPELLANT

vs.

SANTA FE PACIFIC RAILROAD COMPANY, A CORPORATION, APPELLEE

Order staying issuance of mandate

Upon application of Mr. Charles Fahy, Acting Solicitor General of the United States, counsel for the appellant, and good cause therefor appearing, it is ordered that the issuance, under Rule 28, of the mandate of this Court in the above cause be, and hereby is stayed to and including November 29, 1940; and in the event the

petition for a writ of certiorari to be made by the appellant herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

CURTIS D. WILBUR,
United States Circuit Judge.

Dated San Francisco, California, October 28, 1940

[Endorsed:] Order, etc., filed Oct. 28, 1940. Paul P. O'Brien, Clerk.

No. 9271

UNITED STATES OF AMERICA, AS GUARDIAN OF THE INDIANS OF THE TRIBE OF HUALAPAI IN THE STATE OF ARIZONA, APPELLANT

vs.

SANTA FE PACIFIC RAILROAD COMPANY, A CORPORATION, APPELLEE

Certificate of clerk, U. S. Circuit Court of Appeals for the Ninth Circuit, to record certified under rule 38 of the revised rules of the Supreme Court of the United States

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing 218 pages, numbered from and including 1 to and including 218, to be a full, true, and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of Hon. Charles Fahy, Acting Solicitor General of the United States, counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 29th day of October A. D. 1940.

[SEAL] PAUL P. O'BRIEN, *Clerk.*

U. S. GOVERNMENT PRINTING OFFICE 1940

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

UNITED STATES OF AMERICA, PETITIONER

v.

SANTA FE PACIFIC RAILROAD COMPANY

Motion for an extension of time within which to file petition for writ of certiorari

To the Honorable William O. Douglas, Associate Justice of the Supreme Court of the United States:

Your petitioner, the United States, respectfully presents this, its application for an extension of time within which to file a petition for a writ of certiorari in the above entitled case and, in support thereof, presents the following:

1. The United States brought this suit to enjoin the Santa Fe Pacific Railroad Company from interfering with the alleged possessory rights of the Walapai Tribe of Indians to certain lands in northwestern Arizona.

2. The issue involved is whether, where a railroad was granted certain public lands, formerly a part of the lands acquired from Mexico by the Treaty of Guadalupe Hidalgo, which were in the possession of a tribe of Indians on the effective date of the grant, the tribe of Indians had a right of occupancy of such lands under the public policy of the United States so that the title acquired by the railroad under the grant was subject to that right, and if so, whether the right of occupancy has been extinguished by the United States.

3. On August 30, 1940, the United States Circuit Court of Appeals for the Ninth Circuit rendered its decision and entered its order, affirming the judgment of the United States District Court for the District of Arizona dismissing the bill of complaint.

4. Upon considering the filing of an application for a writ of certiorari, it was found that in a sense the Department of Justice is on both sides of the question. That arises in this way. Counsel for the Walapai Tribe may find it advisable to urge in this case that the aboriginal possession of the tribe gave them a right of occupancy valid even as against the United States, even in the absence of treaty recognition, and which could lawfully be extinguished only with the consent of the tribe. However, the Department of Justice, in opposing Indian claim suits, has taken the opposite position in the Court of Claims that there is no Indian right of aboriginal possession which will ground a claim against the United States.

5. It has been determined that a petition for a writ of certiorari should be filed. However, in view of the existing conflict and with the best interests of the Walapai Tribe in mind, the Department of the Interior has undertaken to prepare and present the case to the Supreme Court.

6. It appears in view of the late date on which the case was assigned to it, that the Department of the Interior will require additional time to consider the case and prepare the petition for a writ of certiorari.

Wherefore, it is respectfully requested that the time allowed for the filing of a petition for a writ of certiorari be extended for a period of sixty days from November 30, 1940, the date upon which the time allowed by statute expires.

FRANCIS BIDDLE,
Solicitor General.

Order extending time within which to apply for writ of certiorari

On consideration of the motion of counsel for petitioner in the above entitled case, and good cause therefor having been shown, it is now here ordered that the time within which a petition for a writ of certiorari may be filed herein be, and the same is hereby, extended for a period of sixty days from November 30, 1940.

Dated this 22 day of November, 1940.

WILLIAM O. DOUGLAS,
Associate Justice of the
Supreme Court of the United States.

U. S. GOVERNMENT PRINTING OFFICE: 1941

Supreme Court of the United States

Order allowing certiorari

Filed March 10, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE 1941

No. —

In the Supreme Court of the United States

OCTOBER TERM, 1940

THE UNITED STATES OF AMERICA, AS GUARDIAN OF THE INDIANS OF THE TRIBE OF HUALPAI IN THE STATE OF ARIZONA, PETITIONER

v.

SANTA FE PACIFIC RAILROAD COMPANY, A CORPORATION, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

NATHAN R. MARGOLD,
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RICHARD H. HANNA,
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WILLIAM A. BROPHY,
Special Attorney for the Pueblo Indians,
Albuquerque, New Mexico;

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Assistant Solicitor, Department of the Interior,
Washington, D. C.,
Attorneys for petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. —

THE UNITED STATES OF AMERICA, AS GUARDIAN OF THE INDIANS OF THE TRIBE OF HUALPAI IN THE STATE OF ARIZONA, PETITIONER

v.

SANTA FE PACIFIC RAILROAD COMPANY, A CORPORATION, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor of the Department of the Interior of the United States, being authorized by the Solicitor General of the United States,* on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered in the above cause on August 30, 1940, affirming a judgment of the United States District Court for the District of Arizona.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals is reported in 114 F. (2d) 420. The opinion of the

* The authorization reflected a possible conflict of interest between the United States and its Indian wards on one branch of the argument (R. 215).

district court is not reported but is in record pages 191–196.

JURISDICTION

The judgment of the Circuit Court of Appeals now sought to be reversed was entered on August 30, 1940 (R. 213). Mr. Justice Douglas on November 22, 1940, extended the time for filing this petition for writ of certiorari to January 29, 1941, pursuant to the act of February 13, 1925 (43 Stat. 940). The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the act of February 13, 1925 (43 Stat. 936, 938).

QUESTION PRESENTED

In 1866, the United States granted certain lands in northwestern Arizona to a railroad. These lands are within the area acquired by the United States from Mexico by the Treaty of Guadalupe Hidalgo. It is admitted by the pleadings that on the effective date of the grant the lands were occupied by the Walapai Tribe of Indians which has occupied them from time immemorial, prior to and during Spanish, Mexican, and United States sovereignty. The Walapai Tribe now occupies said lands and has never voluntarily ceded or relinquished its claimed right of occupancy.

The question is:

Whether under the allegations of the complaint the tribe has a right of occupancy in the land described, or any part of it, so that any title acquired by the railroad is subject to that right.

STATUTES, TREATY, AND EXECUTIVE ORDER INVOLVED

The pertinent portions of the act of September 4, 1841 (5 Stat. 453), the Treaty of Guadalupe Hidalgo, February 2, 1848 (9 Stat. 922), the act of July 22, 1854 (10 Stat. 308), the act of March 3, 1865 (13 Stat. 541, 559), the act of July 27, 1866 (14 Stat. 292), the act of July 15, 1870 (16 Stat. 291, 304), the act of March 3, 1871 (16 Stat. 544, 566), appear in the Appendix. The Executive order of President Chester A. Arthur, January 4, 1883 (1 Kappler, Indian Affairs, Laws and Treaties (2d ed. 1904) 804), and the full text of the act of February 20, 1925 (43 Stat. 954), also appear in the Appendix.

STATEMENT

This suit was brought by the United States in its own behalf and as guardian of the Walapai Tribe of Indians to enjoin defendant from claiming any interest in or interfering with the possession and occupancy of the Walapai Tribe of lands in northwestern Arizona, within the area acquired from Mexico by the Treaty of Guadalupe Hidalgo, February 2, 1848 (9 Stat. 922) (R. 2, 19–21). The defendant moved to dismiss the complaint on the ground that matters of which the court could take judicial notice showed that the defendant owned the unburdened fee simple title to the lands (R. 24, 25). The motion was granted; the complaint was dismissed (R. 190, 196), and the plaintiff appealed to the Circuit Court of Appeals of the Ninth Cir-

suit (R. 196). The Court of Appeals affirmed on the ground that the Walapai and other tribes of the Mexican cession did not have any right of occupancy under the public policy of the United States in the absence of an affirmative recognition by the United States of such a right and the United States did not recognize rights of occupancy in that area.

Since 1919, the rights of the Walapai Tribe, as against the defendant, to the land included in this suit, have been investigated by the Department of the Interior and the Senate Committee on Indian Affairs. The Senate Committee held hearings, caused historical documents to be collected, and published the whole as Walapai Papers (S. Doc. 273, 74th Cong., 2d sess., 1936). The Walapai Tribe claimed the land because it had occupied it continuously from pre-Spanish times, and its right was recognized in part when a reservation was established for it on July 8, 1881, and confirmed on January 4, 1883 (R. 4, 5). The railroad claimed odd-numbered sections of the land under a grant to the Atlantic and Pacific Railroad Company, to which defendant is successor, by act of July 27, 1866 (14 Stat. 292). On September 16, 1931, the Solicitor of the Department of the Interior wrote an opinion recognizing that the Walapai and other Indians in the Mexican cession had the usual Indian rights of occupancy, but declaring that the meager information then available was inadequate to establish an Indian title in the Walapai Tribe

to the odd-numbered sections, growing out of use and occupancy, which would defeat the railroad grant (Walapai Papers 319). The Assistant Attorney General, on November 12, 1931, while cautioning that it was impossible to state definitely what the result of a court proceeding might be, agreed informally with the Solicitor of the Department of the Interior (Walapai Papers 325). On June 17, 1932, after hearings, the Chairman of the Senate Committee on Indian Affairs wrote the Secretary of the Interior that evidence had been submitted to the Committee which might cause a different conclusion to be reached, and requested that no further action be taken under the act of February 20, 1925 (43 Stat. 954) (which authorized the exchange of any privately owned lands within the Walapai Reservation for Indian lands), to exchange the Indian lands for railroad lands until a searching inquiry had been made into the rights of the Walapai Indians (Walapai Papers 356).

Thereafter, this suit was instituted. The complaint stated two causes of action, one relating to lands within the Walapai Reservation, and the other relating to lands outside the Walapai Reservation. The complaint alleged that the Walapai Indians are tribal Indians and wards of the Government (R. 3); that the United States owns all of the lands for the use of the Walapai Tribe (R. 3, 10, 15, 16); that the lands in the first cause of action were set apart as a military reservation for